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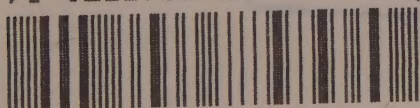
THE LAW REPORTS

1917 1 King's Bench

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THE LAW REPORTS

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1913.

THE
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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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402	delete footnote (4)		
612	footnote (1)	[1913] 2 K. B. D.	[1913] 2 K. B.
675	lines 1 and 2 of case	decision of the judge of the Manchester County Court sitting at Salford	decision of the judge of the Salford County Court.
934	footnote (2)	6 B. C. C.	6 B. W. C. C.

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KING'S BENCH DIVISION
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HIGH COURT OF JUSTICE
AND BY THE
COURT OF APPEAL
ON APPEAL THEREFROM
AND BY THE
COURT OF CRIMINAL APPEAL
AND BY THE
RAILWAY AND CANAL COMMISSION.

JOWITT & SONS v. UNION COLD STORAGE COMPANY.

1913

[1912. J. 1701.]

April 16, 18.

Lien—General Lien—Goods in Cold Store—Pledge of Bills of Lading—Exercise of Lien against Holder of Bills of Lading.

A company imported into England frozen meat purchased by them in Australia. For the purpose of financing the company in the business the plaintiffs paid the price owing by the company to the persons from whom the company had bought the meat, and reimbursed themselves out of the proceeds of bills of exchange discounted by a bank, which bills had been drawn to the bank's order by the plaintiffs and accepted by the company. The bills of lading for the meat were deposited with the bank as security that the bills of exchange would be met. On the arrival of the meat in England the company with the assent of the bank placed the meat in the defendants' cold store to be delivered by the defendants to the bank's order or against bills of lading. The defendants' terms of storage (which were the terms usual in the trade) provided that the defendants should have a general lien on the meat

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STORAGE
COMPANY.

for all charges accrued and accruing against the storer or for any other money due from the owners of the goods. The company having failed to meet their acceptances, the plaintiffs paid the bank and received the bills of lading from the bank and demanded delivery of the meat from the defendants. The defendants claimed to exercise a lien on the meat for charges due to them from the company for the storage of other goods:—

Held, that, the meat having been placed in the defendants' store with the assent of the bank on the terms of the defendants having a general lien, the defendants were entitled to enforce the general lien against the plaintiffs, who had succeeded to the rights of the bank as regards the meat.

Williams v. Allsup (1861) 10 C. B. (N.S.) 417, followed and applied.

Action in the commercial list tried by Scrutton J. without a jury.

The plaintiffs carried on business in Bradford and London as wool merchants, with branch houses in Sydney and Melbourne. In addition to their wool business the plaintiffs had through their Australian houses carried on business as importers of frozen meat. In 1908 a company called the British Standard Produce Company, Limited, was formed, which purchased the plaintiffs' frozen meat business and started to carry on the business in London. The plaintiffs financed the company, the course of business being as follows. The company employed a firm of Gibbs, Bright & Co. in Australia to buy meat for them. The plaintiffs made the necessary arrangements with the shipping companies for space and freight, and the goods were shipped to the order of the company and the bills of lading were indorsed by Gibbs, Bright & Co. as the company's agents. The plaintiffs paid Gibbs, Bright & Co. the amount of the purchase price of the goods, cost of freight, insurance, and commission, by their cheque on the Bank of Australasia, and received from Gibbs, Bright & Co. the invoices for the goods and the bills of lading which the plaintiffs handed to the Bank of Australasia together with bills of exchange to cover the cost, freight, insurance, and other usual charges on the goods drawn by the plaintiffs and accepted by the company and payable to the order of the bank, and thereupon the plaintiffs were credited with the amount of the drafts in their own account at the bank. On the arrival of the goods in London, if the meat had not already

been sold, the company with the assent of the bank placed the goods in a cold store, the owner of the store undertaking to the bank not to deliver the goods except against the order of the bank or a duly indorsed bill of lading. On the company discharging their acceptances of the bills of exchange they obtained from the bank the bills of lading and possession of the goods from the cold store.

The question in this action arose with regard to consignments of meat which had arrived in London in the steamships *Otranto*, *Osterley*, *Suffolk*, and *Miltiades*, and which had been stored by the company in the defendants' cold store in accordance with the usual course of business. The company failed to take up their acceptances with regard to these goods, and the plaintiffs as drawers of the bills of exchange had therefore paid the bank, and on payment had received the shipping documents from the bank. In the case of the shipment by the *Otranto*, which consisted in part of 400 quarters of beef, the company arranged with the plaintiffs to take 250 quarters for cash, and the defendants accordingly released these goods out of their store; as to the remaining 150 quarters the plaintiffs surrendered the bills of lading to the defendants and received in exchange five warrants issued by the defendants for the 150 quarters. These warrants contained upon them the following clause:—"Subject to the conditions of our printed receipts." Subsequently the plaintiffs sent to the defendants these warrants and the bills of lading relating to other goods shipped by the *Otranto* and the bills of lading relating to the shipments by the *Osterley*, *Suffolk*, and *Miltiades*, and requested that all these shipments should be placed to their order. The defendants replied that they had received the goods as warehousemen and held them upon the terms contained in their printed landing receipts, which contained the following conditions:—

"(2.) Goods are only received subject to a general lien for all charges accrued and accruing against the storer or for any other moneys due from the owners of the goods, and if not removed after seven days notice has been given to the storer, or sent by post to his last known address, may be sold to defray the liens and all expenses incurred."

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“(3.) Transfers are allowed subject to a general lien on the goods for all sums due from the storer.”

The defendants contended that they had as against the plaintiffs a lien on the goods both for the amount of the charges for storage of these particular goods and also for storage charges incurred by the company in respect of other goods; and the defendants refused to place the goods to the plaintiffs' order unless the plaintiffs undertook to pay these charges, but the defendants were willing to spread the amount over the whole of the goods at the rate of 10s. a cwt.

The plaintiffs paid under protest the sum claimed and sought in this action to recover it back as money paid under duress.

On behalf of the defendants witnesses were called who stated that there is a custom in the cold storage business in London by which the owner of the cold store has a lien on goods stored for all charges which have accrued or are accruing against the storer of the goods.

In the course of the arguments it was admitted on behalf of the plaintiffs that the defendants were entitled to a particular lien in respect of the charges due for each parcel, and also that in respect of the 150 quarters *ex Otranto* the defendants were entitled to claim a general lien.

Atkin, K.C., and Coutts Trotter, for the plaintiffs. The Bank of Australasia had a charge on the goods for the amount advanced by the bank on the bills of exchange. The bank consented to the storage of the goods by the British Standard Produce Company with the defendants, but the bank were no parties to any contract between the company and the defendants. The plaintiffs having paid off the bills of exchange and obtained the documents of title from the bank are in the same position and have the same rights as the bank. Their position is that of sureties, and, therefore, as against the defendants their rights are greater than those of the company. As against the bank the defendants had no right to exercise a general lien on the goods. The bank had a charge upon the goods for their advances and the company could not create any charge in priority to that. The fact that the defendants received the goods from the company on the terms

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that the defendants should have a general lien for all charges due from the storer, the company, does not entitle the defendants to exercise that general lien against the plaintiffs: *Wright v. Snell*. (1) It was the intention of the parties that the bills of lading should represent the goods, and the plaintiffs were therefore as regards the defendants the true owners of the goods as distinguished from the company. In *Leuckhart v. Cooper* (2) a custom for public warehouse-keepers in London to have a general lien on all goods housed in their warehouse for and in the name of merchants for all moneys due from the merchants to the warehouse-keepers was held to be unreasonable and bad in law. The fact that the bank consented to the company's storing the goods would at the most only give the defendants as against the bank a particular lien on each parcel of goods for the charges due in respect of each parcel. [They also referred to *Hill & Sons v. London Central Markets Cold Storage Co.* (3)]

Leck, K.C., and *F. D. Mackinnon*, for the defendants. The goods were stored with the defendants on the terms that they should have a general lien. It is said that that general lien would not affect the true owners of the goods. The British Standard Produce Company and not the plaintiffs were the true owners of the goods. The bank were only pledgees of the bills of lading, and would not obtain the property in the goods until they reduced them into possession: *Sewell v. Burdick*. (4) The bank authorized the storage of the goods by the company with the defendants, and apart from any special agreement between the company and the defendants, the bank must be assumed to have known that the storage would be upon the usual terms, and the evidence shews that the usual terms include a general lien. The defendants could therefore have exercised a general lien against the bank. In *Williams v. Allsup* (5) it was held that a mortgagor of a ship who remains in possession has an implied authority to confer a right of lien for repairs necessary to keep the ship seaworthy; and in *Singer Manufacturing Co. v. London and South Western*

(1) (1822) 5 B. & Ald. 350.

(2) (1836) 3 Bing. N. C. 99.

(3) (1910) 15 Com. Cas. 221.

(4) (1884) 10 App. Cas. 74, at p. 86.

(5) 10 C. B. (N.S.) 417.

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Ry. Co. (1) it was held that a railway company had a lien against the true owner of a sewing machine for cloak-room charges due from a bailee of the machine, one of the grounds of the decision being, in the words of Collins J., "that the person who deposited his machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it." That decision was followed in *Keene v. Thomas*. (2) These authorities shew that the defendants' lien was good as against the bank. The plaintiffs' rights can be no greater than those of the bank. The goods had been stored before the plaintiffs paid the amount of the bills of exchange and got the documents from the bank. The bills of lading were not at that time documents of title, for delivery under the bills of lading had already been made, by removal of the goods from the ship to the defendants' premises. The defendants besides being warehousemen are wharfingers, and a wharfinger has a general lien on goods brought to his wharf for the balance of a general account: *Naylor v. Mangles* (3); *Spears v. Hartly* (4); and it was decided in *In re Witt, Ex parte Shubrook* (5) that a packer is entitled to a general lien on the goods of his customer which are in his hands.

[SCRUTTON J. referred to *Moet v. Pickering*. (6)]

Wright v. Snell (7) is distinguishable because the question there was as to the right to exercise a lien against the owner of the goods for charges due from the consignee who was not the owner. In the present case the defendants are only seeking to exercise a general lien in respect of charges due from the Produce Company to whom the goods belonged.

Coutts Trotter in reply. The plaintiffs having paid the bank are in the position of sureties, and are entitled to the benefits of the securities which the bank held: *Duncan, Fox & Co. v. North and South Wales Bank*. (8) The plaintiffs as holders of the bills of lading were entitled to receive the goods. It is said that the bills of lading were no longer operative after the goods had been discharged, but the question of the accomplishment of a bill of

(1) [1894] 1 Q. B. 833.

(2) [1905] 1 K. B. 136.

(3) (1794) 1 Esp. 109.

(4) (1800) 3 Esp. 81.

(5) (1876) 2 Ch. D. 489.

(6) (1878) 8 Ch. D. 372.

(7) 5 B. & Ald. 350.

(8) (1880) 6 App. Cas. 1.

lading depends on the arrangement between the parties, and in this case the arrangement was that the goods should be delivered up by the defendants on presentation of the bills of lading. *Barber v. Meyerstein* (1) is an instance of a case where a bill of lading continued to be operative after the goods had been discharged from the ship and placed in a warehouse. The plaintiffs' rights as sureties are unaffected by a previous arrangement as to storage between the bank and the company, but the bank while assenting to or authorizing the storage of the goods cannot be taken to have assented to the defendants having a general lien on the goods in priority to the bank's charges. The cases of *Singer Manufacturing Co. v. London and South Western Ry. Co.* (2) and *Keene v. Thomas* (3) were not decisions as to the right to a general lien. In the absence of a special contract a wharfinger has no general lien: *Bowman v. Malcolm*. (4)

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Cur. adv. vult.

April 18. SCRUTTON J. read the following judgment:—Robert Jowitt & Sons, the plaintiffs, paid 833*l.* 1*s.* 4*d.* to the Union Cold Storage Company, Limited, the defendants, to secure delivery of certain frozen meat, and now claim to recover it back as paid under duress. The Union Cold Storage Company say they were entitled to refuse to deliver the meat by reason of a contract giving them a general lien for all charges accrued and accruing against the storer or for any other moneys due from the owners of the goods. The plaintiffs reply that this clause was not binding on them, as they were not the contracting parties.

The facts are as follows. The plaintiffs had carried on a meat business and stored frozen meat in London stores and knew the ordinary terms of such stores. But this branch of their business did not pay, and they sold it to a company called the British Standard Produce Company, Limited, in which they were largely interested. They procured a credit for this company with the Bank of Australasia by putting their name as drawers on bills drawn on the British Standard Produce Company which the bank discounted. With the money raised

(1) (1870) L. R. 4 H. L. 317.

(2) [1894] 1 Q. B. 833.

(3) [1905] 1 K. B. 136.

(4) (1843) 11 M. & W. 833.

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by this means the plaintiffs paid the vendors of the meat and shipped the goods, taking bills of lading making the goods deliverable to the British Standard Produce Company, which bills were pledged with the bank as security for the bills of exchange being met. On the arrival of the ship the British Standard Produce Company, by arrangement with the bank, landed the goods into cold store on the ordinary terms, the Stores undertaking to the bank not to deliver except against bank's order or duly indorsed bill of lading. When the bank's claim was satisfied the goods were released. This went all well so long as the British Standard Produce Company met the bills of exchange, but in April-May, 1912, they failed to do so: the plaintiffs were called upon to take up the bills and did so, and as sureties were entitled to the benefit of all securities held by the bank: see *Duncan, Fox & Co. v. North and South Wales Bank*. (1) They got the bills of lading and either exchanged them for warrants under which they claimed delivery or presented them direct to the stores and claimed delivery. The Stores, the defendants, thereupon said "These goods are stored with us on terms including condition 2," which was as follows: "Goods are only received subject to a general lien for all charges accrued and accruing against the storer or for any other moneys due from the owners of the goods, and if not removed after seven days' notice has been given to the storer, or sent by post to his last known address, may be sold to defray the liens and all expenses incurred." The Stores said, "You must pay the charges due in respect of the goods you want, and also other charges due against the British Standard Produce Company as the storer and the owner of the goods. We will not claim the whole sum against the first parcel, but will spread it over all the goods at the rate of 10s. a cwt." The defendants paid this claim under protest and bring this action to recover the amount.

At the trial the plaintiffs admitted they were liable to pay the particular charges in respect of the goods they demanded. I think they were bound to make this admission. The bank, to whose rights and securities the plaintiffs succeeded, were pledgees from owners who were left by the bank in possession of

(1) 6 App. Cas. 1.

the goods, and who were entitled as against their pledgees to take the ordinary steps to preserve them. One of the most obvious steps was to store frozen meat in a refrigerating store, and if the pledgees then desired to take possession of the goods they could only do so on satisfying the liens or charges which were the ordinary result of such storage, which would certainly include particular liens and charges. This appears to be the principle laid down by Collins J., as he then was, in *Singer Manufacturing Co. v. London and South Western Ry. Co.* (1), and followed by the Divisional Court in *Keene v. Thomas*. (2)

The plaintiffs further admitted in the course of the case that, as in the case of goods ex *Otranto* they had exchanged the bill of lading for warrants issued by the defendants "subject to the conditions of our printed receipts," they were bound by those conditions as to the *Otranto* goods and could not recover the 10s. a cwt. which the defendants had claimed in respect of those goods; but they said that, as the defendants had not demanded the whole sum they might have claimed under their general lien under condition 2 on the *Otranto* goods; but had spread their claim over the whole goods, they could not justify their ultimate demand by the demand they could, if they wished, have made on the *Otranto* goods. This is a somewhat ungrateful use to make of a concession made solely in the interests of the plaintiffs, but if the defendants had no general lien on the goods other than those from the *Otranto*, I think the contention would be correct in law and the admission would only cover the 10s. a cwt. demanded in respect of the *Otranto* goods.

But the defendants further contend that the admission as to particular charges goes further than the plaintiffs intend it to go, and that where the Stores have received from one customer a large number of carcases from one ship they have a particular, not a general, lien on each carcase for the charges on all; and the defendants contend that their particular lien covers the charges on the carcases from each ship other than those delivered to the plaintiffs, such carcases being pledged to the bank and deposited, with the bank's consent, with the stores by the British Standard Produce Company. I think this contention is correct in law.

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(1) [1894] 1 Q. B. at p. 837.

(2) [1905] 1 K. B. 136.

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It is under this principle that the ordinary mercantile transaction of discharging part of a cargo and holding the rest under a lien for freight on the whole is justified, and in my view the defendants can hold goods in any landing account for the charges on other goods received from the same owner in the same landing account.

But in my view the defendants' final contention, which includes all the above and goes further, is also correct. They say, "If you the plaintiffs are a surety you have only the creditor's rights, those of the bank; the bank, a pledgee, has left its goods in the hands of their owner with implied authority to secure their preservation on the usual terms, and if those usual terms involve a general lien that lien is good against the bank, which not only impliedly authorized the storage but actually knew of and consented to it." This principle is that stated by Willes J. in *Williams v. Allsup* (1): "Upon the facts which appear on this case, this vessel could not be so used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagor to get the vessel repaired,—not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given. To that extent I think the property of the mortgagees is impliedly modified." Substituting "pledgee and pledgor" for "mortgagee and mortgagor," "meat" for "ship," and "stores" for "shipwright," it appears to me that the case is exactly the same. I find that the bank knew of and consented to the storage, and that the terms on which the goods were stored, including the general lien, are the ordinary and customary terms for cold storage in London; indeed, I doubt, for reasons connected with the nature of the cold storage business, whether storage could be procured on any other terms.

For these reasons I hold that the defendants are entitled to claim against the plaintiffs a general lien for the proper amount of charges due to them from the British Standard Company.

I only desire to say, further, that I am by no means satisfied

that after the goods had been delivered by the ship and all freight paid, the bill of lading had any operation as a document of title to goods, or that, if by the agreement between the bank and the stores it was such a conventional title, the plaintiffs were entitled to any benefit from that agreement or got any right against the defendants by the mere transfer of the bill of lading. But it is not necessary to decide this.

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Judgment for defendants.

Solicitors for plaintiffs: *Corbin, Greener & Cook, for Beaumont & Croft, Leeds.*

Solicitor for defendants: *Chas. H. Wright.*

F. O. R.

In re A DEBTOR (No. 14 OF 1913).

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May 5.

Principal and Surety—Co-Judgment Debtors—Time given to one Judgment Debtor—Discharge of Surety—Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5.

The rule of law that time given to a principal debtor discharges a surety does not apply when the time is given after a judgment for the debt has been recovered by the creditor against both the principal debtor and the surety.

Jenkins v. Robertson (1854) 2 Drew. 351, followed.

APPEAL by the debtor from the refusal of the registrar of the Birmingham County Court to set aside a bankruptcy notice dated March 14, 1913.

The bankruptcy notice was founded upon a judgment, dated December 21, 1910, which had been obtained by the petitioning creditor against the appellant and one Humpage and the Barton-on-Sea Land Company, Limited, on a bill of exchange drawn by Humpage, accepted by the company and indorsed by the appellant. By an agreement dated June 29, 1911, the judgment creditor took security from Humpage in respect of the judgment debt, and allowed him six months' extension of time in which to pay it. The appellant applied to the registrar to set aside the

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In re. bankruptcy notice, on the ground that Humpage was the principal debtor, and that he, the appellant, had indorsed the bill of exchange merely as a surety, and that the judgment creditor, by giving time to the principal debtor, had therefore discharged the surety.

The registrar held that, as the appellant was a judgment debtor at the date of the agreement of June 29, 1911, time granted to Humpage, who was a co-judgment debtor with the appellant, did not prejudice the rights of the judgment creditor as against the appellant, and he therefore refused to set aside the bankruptcy notice.

Tindale Davis, for the appellant. The appellant was only liable on the bill of exchange as a surety, and time having been given to the principal debtor, the appellant is wholly discharged: *Duncan, Fox & Co. v. North and South Wales Bank* (1); *Hall v. Cole*. (2) The appellant being a surety would, but for the agreement to give time to the principal debtor, have been entitled on payment of the judgment debt to have the judgment assigned to him and to enforce it against the principal debtor: Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5. The appellant has therefore clearly been prejudiced by the agreement. It makes no difference that the time was given after judgment had been obtained. It was decided in *In re E. W. A., a Debtor* (3) that the rule of law that the release of one of two joint debtors under a joint and several obligation operates as a release of the other applies as much to a judgment debt as to any other obligation. [He also referred to *Wolmershausen v. Gullick*. (4)]

Zefferdt (G. W. H. Jones with him), for the respondent. The law of principal and surety has no application to this case, for the original contract on the bill of exchange is now merged in the new contract created by the judgment under which all the judgment debtors are liable as principals: *Jenkins v. Robertson*. (5) The appellant is not now a "surety for the debt or duty of another" within s. 5 of the Mercantile Law

(1) (1880) 6 App. Cas. 1.

(3) [1901] 2 K. B. 642.

(2) (1836) 4 A. & E. 577.

(4) [1893] 2 Ch. 514.

(5) 2 Drew. 351.

Amendment Act, 1856, and cannot claim rights conferred by that section. The case of *In re E. W. A., a Debtor* (1) is distinguishable, for there the effect of the arrangement made by the judgment creditor with one of the two judgment debtors was to discharge the whole liability under the judgment, and therefore no debt remained upon which bankruptcy proceedings against the other judgment debtor could be founded.

Tindale Davis replied.

PHILLIMORE J. In my opinion this appeal fails. I think that the answer given by the registrar to the contention of the appellant is a good one, namely, that as the appellant was a judgment debtor at the date of the agreement by the judgment creditor to give time to his co-judgment debtor, that agreement did not prejudice the rights of the judgment creditor against the appellant. For the purpose of my judgment I will assume that it is the fact that the appellant's liability on this bill of exchange was as between him and the other parties to it that of a surety only. But the original debt has now become merged in the judgment, and all the defendants against whom judgment has passed stand on an equal footing. Each judgment debtor is liable to pay to the judgment creditor the whole of the debt, and the only advantage which one judgment debtor derives from the existence of the other judgment debtors is that, as the judgment creditor is only entitled to be paid the full amount of his debt and no more, payment by one judgment debtor is pro tanto in favour of the others. There is no question as to one judgment debtor being liable to a greater extent than the others; as far as the judgment creditor is concerned they are all equally liable. It is therefore unnecessary to discuss the rights and remedies of the judgment debtors inter se. The law is well and concisely put in *Jenkins v. Robertson* (2), where two persons were indebted, one as principal and the other as surety; the surety having died, the creditor obtained a decree in a creditor's suit against his estate. Afterwards the creditor sued the principal debtor and took a judgment by arrangement, giving time without the knowledge of the surety. It was held that the surety was not

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(2) 2 Drew. 351.

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discharged, because, as Kindersley V.-C. said, "the subsequent dealing with the principal debtor does not operate to discharge the surety from a liability under which he is, no longer as a surety, but under the decree." That being so, the point raised in this case by the appellant can only be founded on the broad principle that either under the Mercantile Law Amendment Act or the general law there is such a right between co-contractors who are co-defendants that a judgment creditor by dealing with one judgment debtor may run the risk of losing all his rights against the other. In my opinion there never was any such principle as that, and the Mercantile Law Amendment Act has not altered the position. The doctrine that the giving of time to the principal debtor releases the surety has no application where a judgment has been recovered against several co-defendants, whatever their original rights inter se, whether as principal and surety or as co-joint debtors, may have been.

HORRIDGE J. I agree. The appellant and Humpage were both defendants on the same judgment. It is contended that because the judgment creditor agreed to give time to Humpage for paying the debt, the fact that he was the original principal debtor, and the appellant only a surety, prevents the judgment creditor from now enforcing the judgment against the appellant. The decision in *Jenkins v. Robertson* (1) makes it clear that the judgment creates a new liability in respect of which all the judgment debtors are in the same position. The decision in *In re E. W. A., a Debtor* (2) turned on a different point, because there the effect of the agreement between the creditor and one joint debtor was that there was an accord and satisfaction equivalent to a release from the joint and several judgment debt, and therefore no debt remained against the other defendant to the judgment.

Appeal dismissed.

Solicitor for appellant: *Edmund Fitzgerald, for T. E. Silvester, Birmingham.*

Solicitors for respondent: *Alfred Double & Sons.*

(1) 2 Drew. 351.

(2) [1901] 2 K. B. 642.

WESTERN ELECTRIC COMPANY, LIMITED v. GREAT EASTERN RAILWAY COMPANY.

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May 21.

Railway—Carriage of Goods—Steam Vessels—Carriage partly by Sea and partly by Land—Contract for through Carriage—Exception of Negligence—Reasonableness—Alternative Rate at Railway Company's Risk during Land Portion of Carriage—Damage to Goods during Land Carriage—Great Eastern Railway (Steamboats) Act, 1863 (26 & 27 Vict. c. cccxv.), s. 5—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.

The defendants owned steamers trading between Antwerp and Harwich, and they also owned a line of railway from Harwich to North Woolwich. Their special Act, which empowered them to maintain and work the steamers, applied the provisions of the Railway and Canal Traffic Act, 1854, to the steamers and the traffic carried thereon. The plaintiffs were in the habit of having goods consigned to them from Antwerp to North Woolwich via Harwich by the defendants' steamers and railway, and they had signed an agreement requesting that all goods for which there were alternative rates delivered by them or on their account at any of the defendants' stations for carriage by railway might be carried at the reduced rates, and in consideration thereof the plaintiffs agreed to relieve the defendants from all liability for loss, damage, misdelivery, delay, or detention except upon proof that such loss, &c., arose from wilful misconduct on the part of the defendants' servants. Goods of the plaintiffs were shipped on the defendants' steamer at Antwerp for delivery at North Woolwich Station via Harwich at the reduced rate under a bill of lading which had "owner's risk" upon it, and which exempted the defendants from liability for (inter alia) all accidents, loss, and damage whatsoever from any act, neglect, or default of the pilot, master, officers, engineers, or crew in the management or navigation of the ship or otherwise. The goods were damaged during the land journey between Harwich and North Woolwich owing to the negligence of the defendants' servants. There was a higher rate for goods of the same class from Antwerp to North Woolwich under which the goods would have been carried, so far as the land portion of the journey was concerned, at the defendants' risk as common carriers, but the plaintiffs would have had to accept a bill of lading for the sea portion of the journey containing the same negligence clause as that in the bill of lading under which the goods were actually carried :—

Held, that as it was one journey from Antwerp to North Woolwich, and as during the sea portion of that journey there was no alternative rate under which the plaintiffs could have had the goods carried at the defendants' risk as common carriers, the condition relieving the

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defendants from liability for negligence was not just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854, and that therefore the defendants were liable for the damage to the goods.

APPEAL from the City of London Court.

The action was brought to recover damages for injury to two cases of telephonic accessories while being carried on the defendants' railway from Harwich to North Woolwich, owing to the negligence of the defendants' servants.

For several years the plaintiffs had consigned similar goods from Antwerp to North Woolwich via Harwich, that is to say, by the defendants' steamers from Antwerp to Harwich and by the defendants' railway from Harwich to North Woolwich. By the Great Eastern Railway (Steamboats) Act, 1863 (26 & 27 Vict. c. ccxxv.), the defendants were empowered to maintain and work steam vessels between the port of Harwich and the ports of Flushing, Rotterdam, and Antwerp, and by s. 5 "the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels of the company, and to the traffic carried thereon."

On September 19, 1907, it was agreed between the plaintiffs and the defendants that the rate for the carriage of the plaintiffs' goods from Antwerp to North Woolwich should be 20s. per ton if declared at owner's risk. On June 7, 1910, the defendants' goods manager wrote to the plaintiffs stating that with the view of meeting some of the objections which traders had taken to the then existing form of agreement for carriage of traffic at owner's risk the railway company had made certain alterations of a concessionary character, and they enclosed a form of agreement in which the new conditions were embodied. The document was dated June 7, 1910, and was headed "General agreement for goods to be carried at reduced rates at owner's risk," and it stated: "I beg to inform you that the Great Eastern Railway Company have two rates for the carriage of certain goods, at either of which rates the same may be consigned at the sender's option:—one, the ordinary rate, when the company accept the ordinary liability of a railway company; the other, a reduced rate, adopted when the sender agrees to relieve the company and all other companies or persons over whose lines the

goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of trader's trucks) except (1.) upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. . . . If you wish to have the advantage of the reduced rate, it will be necessary for you to fill up and sign the form printed below, and then return it to the company." The form referred to was filled up and signed by the plaintiffs and was returned to the defendants. It was headed "To the Great Eastern Railway Company," and so far as material was as follows: "In reference to the above we request that all goods for which there are alternative rates delivered by us or on our account at any of your stations, for carriage by railway, may be carried at the reduced rates (where and so long as such rates exist) except when specially consigned at the higher rate; and in consideration of your charging for the said goods such reduced rates we agree to relieve you and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay or detention (including detention of trader's trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants"

In 1912 the plaintiffs had two cases of telephonic accessories consigned to them from Antwerp to North Woolwich via Harwich at the reduced rate of 20s. per ton. The goods were shipped under a bill of lading which stated that they were shipped in good order and well conditioned upon the defendants' steamer at Antwerp bound for Harwich, to be delivered in the like good order and condition to the plaintiffs at North Woolwich Station, "the act of God, the King's enemies and all accidents, loss, and damage whatsoever from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, or crew in the management or navigation of the ship or otherwise as also railway accidents being excepted, and the owners being in no way liable for any consequences of the causes

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above excepted." The bill of lading had the words "owner's risk" printed upon it. The rate of freight was not specified therein, the rate having been already settled by the agreement of September 19, 1907. It appeared that there was an alternative rate of 33s. per ton for the carriage of goods of a similar description from Antwerp to North Woolwich Station via Harwich, under which so far as the land part of the journey was concerned the goods would be carried at the defendants' risk as common carriers, but so far as the sea part of the journey was concerned the plaintiffs would have had to accept a bill of lading in similar terms to and containing the same negligence clause as the bill of lading in the present case, except that the words "owner's risk" would not have appeared upon it.

While the goods were being conveyed from Harwich to North Woolwich by railway they were damaged by rain owing to the negligence, but not the wilful misconduct, of the defendants' servants.

The judge of the City of London Court, in the course of his judgment, said that in his opinion the contract must be treated as a contract for the whole journey, and not as divisible into separate contracts for land and sea carriage, the bill of lading stating the journey to be from Antwerp to North Woolwich Station. The goods were carried at a reduced rate at owner's risk, the conditions being contained in the agreement of June 7, 1910, and the bill of lading. He drew the inference from the correspondence and the evidence that, if the plaintiffs had elected to pay the higher rate, they would nevertheless have had to accept a bill of lading containing the negligence clause. In his opinion the plaintiffs did not have an alternative option to send the goods on the terms of the defendants having the ordinary liability of common carriers, and therefore the defendants, on whom the onus lay, had not shewn that the condition on which they relied was just and reasonable within s. 7 of the Railway and Canal Traffic Act, 1854. He accordingly gave judgment for the plaintiffs. The defendants appealed.

J. R. Atkin, K.C., and *Bruce Thomas*, for the defendants. It is not denied in this Court that, according to the decisions of

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Pickford J. in *Riggall & Son v. Great Central Ry. Co.* (1) and of Lord Coleridge J. in *Jenkins v. Great Central Ry. Co.* (2), a condition exempting the defendants from liability on the sea journey, in the absence of a reasonable alternative rate under which the goods would be carried at the defendants' risk, would not be just and reasonable within the meaning of s. 7 of the Railway and Canal Traffic Act, 1854. No question, however, arises in this case as to the sea carriage. The damage to the goods occurred during the land carriage, and with regard to the land carriage the goods were carried, as the judge has found, at the owner's risk on the terms of the agreement signed by the plaintiffs on June 7, 1910, there being an alternative rate under which the plaintiffs could have had the goods carried at the defendants' risk. The clause therefore exempting the defendants from liability for negligence is just and reasonable within the meaning of s. 7 of the Act of 1854 : *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Brown.* (3) It is no answer to that contention to say that the goods were shipped under a bill of lading for a journey from Antwerp to North Woolwich Station via Harwich. The terms agreed upon as to the land portion of that journey are different from the terms applicable to the sea portion, and the fact that there was no alternative rate for the sea portion under which the defendants would have undertaken the ordinary liability of carriers cannot affect the land portion where the terms are different. The fact that the condition in the bill of lading exempting the defendants from liability, which can only apply to the sea carriage, may be unreasonable so far as regards the sea carriage cannot affect the condition exempting them from liability in the agreement of June 7, 1910, which applies to the land carriage. The whole contract is not unreasonable. The bill of lading regulates the sea carriage, and at the time it was entered into the parties had already agreed upon the terms regulating the land carriage and the freight for the whole journey. The sea carriage is not in question here. The only matter for consideration is whether the condition applicable to the land carriage is just and reasonable. If the carriage had

(1) (1909) 14 Com. Cas. 259.

(2) [1912] 1 K. B. 1.

(3) (1883) 8 App. Cas. 703.

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been over two railway companies' lines and the condition were unreasonable in respect of one line, that would not make it unreasonable as regards the other line. The plaintiffs, therefore, are bound by the clause relieving the defendants from liability, and the defendants are entitled to judgment.

R. Bankes, K.C., and R. H. Balloch, for the plaintiffs. It is a question of fact in each case whether a condition is just and reasonable: per Lord Watson in *Manchester, Sheffield, and Lincolnshire Ry. Co. v. Brown* (1); and the judge in the Court below having found as a fact that the condition is unreasonable and not having acted on any wrong principle of law, this Court will not interfere with that finding. Further, the judge has found there was a contract for one journey from Antwerp to North Woolwich Station, and for that journey the plaintiffs had not the option of sending their goods at the risk of the defendants as common carriers. During part of that journey, namely, the sea portion, even if they had paid the higher rate of 33s. a ton, the plaintiffs would have had to accept a bill of lading relieving the defendants from liability for the negligence of their servants. To make such a condition reasonable a choice must be left to the trader to have his goods carried at the company's risk: *Rooth v. North Eastern Ry. Co.* (2); *Gallagher v. Great Western Ry. Co.* (3) No such choice was given here. If a railway company carries goods by railway at owner's risk from one place to another, and during part of that journey the company gives the trader no option to have the goods carried at the company's risk, the condition exempting them from liability for negligence is unreasonable in toto. No distinction can be drawn between that case and the present. The alternative rate at the railway company's risk must be applicable to the whole journey. That was not so here, and the decision was right.

Bruce Thomas in reply. The question whether a contract is just and reasonable within the meaning of s. 7 is a question for the Court and not for the jury: *Great Western Ry. Co. v. McCarthy*. (4) The case for the defendants may be put in another

(1) 8 App. Cas. at p. 716.

(3) (1874) I. R. 8 C. L. 326.

(2) (1867) L. R. 2 Ex. 173, at p. 178.

(4) (1887) 12 App. Cas. 218, at pp. 229, 239.

way. The contract of carriage is not contained in the bill of lading, which is only a receipt for the goods stating the terms on which they are received by the ship, and is therefore evidence of those terms: per Lord Bramwell in *Sewell v. Burdick*. (1) In the present case, however, it is not even evidence of the terms on which the goods were received. Those terms had already been agreed upon between the parties by the document of June 7, 1910, for the whole journey from Antwerp to North Woolwich, and could not be affected by the master signing a bill of lading. According to that agreement the defendants had two rates for the carriage of goods for that journey, under one of which they took the ordinary liability of a railway company. Therefore, even if the plaintiffs on paying the higher rate would have had to accept a bill of lading containing the negligence clause, the contract of June 7, 1910, would not have been affected. The plaintiffs therefore had an alternative of having their goods carried at the defendants' risk.

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CHANNELL J. With the greatest possible reluctance I have come to the conclusion that we must support the judgment of the learned judge of the City of London Court. I do not see my way to decide otherwise, though I have endeavoured to do so, because I think that the result is obviously unjust. The plaintiffs have been sending their goods at the lower rate for years, and in all probability they have saved an amount largely in excess of this particular damage, and now when goods are damaged the point is raised. It seems to me to be extremely unjust, but Acts of Parliament, which are passed with the best possible objects, may in particular cases sometimes work injustice. We have only to declare the law as it is stated in the Act.

In this case the defendants have entered into an agreement with the plaintiffs which is set out in the document dated June 7, 1910, and which so far as it relates to the land carriage is perfectly good, because so far as the land carriage from Harwich to North Woolwich is concerned the defendants have an alternative ordinary rate which imposes upon them the

(1) (1884) 10 App. Cas. 74, at p. 105.

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liabilities of common carriers, and in that document they state that they have the two rates, and they offer to take the goods at the lower rate if the plaintiffs will relieve them from certain portions of their liability, and the plaintiffs have accepted that offer. What was contemplated, however, was a carriage of goods from Antwerp to North Woolwich via Harwich, which would include a sea journey. It does not appear what was the form of bill of lading in use at that time, but we may assume that it was in the same form as that in use now. If there had been any change in it it would probably have been brought to our notice. Whether the bill of lading is the contract or is only evidence of the contract seems to me not to be material, because the terms contained in it are part of the contract. Whether they are made so by the bill of lading being the contract, or whether the bill of lading is only a receipt for the goods containing a statement of what the terms of the contract are, the exceptions contained in it are part of the contract. That being so, if the use of that bill of lading was compulsory, it is obvious that, so far as the sea portion of the journey is concerned, it cuts down the liability of the defendants as common carriers and gives the plaintiffs no alternative. The law, so far as the sea journey is concerned, leaving out of consideration the provisions of the Railway and Canal Traffic Act, 1854, is that the shipowner can do that if he expresses it in clear language. In this particular case the steamers belong to the defendants, and they had to obtain statutory powers to enable them to maintain and work the steamers, and Parliament gave them the necessary powers upon the terms that the provisions of the Railway and Canal Traffic Act, 1854, should apply to the steamers and to the traffic carried thereon. The result is that this clause in the bill of lading relieving the defendants from liability for the negligence of their servants is, as was decided by Pickford J. in *Riggall & Son v. Great Central Ry. Co.* (1) and by Lord Coleridge J. in *Jenkins v. Great Central Ry. Co.* (2), void as being unreasonable. It is, however, part of the contract. Upon the assumption that this was the form of bill of lading in 1910, as I have no doubt was the fact, and that its use was compulsory, then the statement in

(1) 14 Com. Cas. 259.

(2) [1912] 1 K. B. 1.

the document of June 7, 1910, that under the ordinary rate "the company accept the ordinary liability of a railway company" is an inaccurate statement. What was really offered was that the defendants would carry the plaintiffs' goods from Antwerp to North Woolwich, if the higher rate were paid, upon the terms of the bill of lading, so far as the sea carriage was concerned with restricted liability, and so far as the land carriage was concerned with the full liability of a railway company. I have no doubt that if the plaintiffs had written to the defendants and stated that they wanted their goods carried with the ordinary liability of a railway company over the whole journey, the defendants would have quoted a rate at which they would have been willing to do it. The plaintiffs did not do so. They are, however, entitled to say that the defendants did not offer at the higher rate to carry the goods with the liability of common carriers throughout the whole journey, and that therefore, upon the authorities, the condition limiting their liability is not just and reasonable. I cannot say that they are not entitled to take advantage of s. 7. The learned judge has stated in his judgment that he drew the inference from the correspondence and the evidence that "if the plaintiffs had elected to pay the higher rate they would nevertheless have had to accept a bill of lading containing the negligence clause." We are bound by that finding of fact. If that is so, the plaintiffs have not been offered the option of having their goods carried with the ordinary liability of the defendants as common carriers, and therefore, according to the authorities, the defendants have taken advantage of their monopoly—and I think it is a practical monopoly even so far as their steamers are concerned, as well as the railway—to get some advantage which the Legislature did not think they ought to have.

In these circumstances I cannot say that this condition is just and reasonable within s. 7 of the Act, and the appeal must be dismissed.

LORD COLERIDGE J. I am of the same opinion. By s. 7 of the Railway and Canal Traffic Act, 1854, a railway company is rendered incapable of restricting its liability for the loss of or

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injury to goods occasioned by the neglect or default of the company or its servants by any condition except such as shall be considered by the Court or judge to be just and reasonable. The Great Eastern Railway (Steamboats) Act, 1863, empowered the defendants to maintain and work steam vessels between Antwerp and Harwich, and by s. 5 the provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, are extended to the steam vessels and to the traffic carried thereon. The result is that carriage by sea and by land are placed upon the same footing so far as regards the question whether the limitation of liability is just and reasonable. The Courts have laid down that a sound test of what is just and reasonable is whether or not an alternative option is given to the trader to have his goods carried with the ordinary liability of the railway company as carriers. If the trader is given that alternative then it is a ground for saying that any limitation of that liability accompanied by a lower rate may or may not in the circumstances be just and reasonable. In this case goods were shipped for a single transit from Antwerp to London. They were shipped under a bill of lading, and the effect of that bill of lading and the contract relating to the land carriage was this. So far as related to the sea carriage the defendants limited their liability without giving the plaintiffs an option of having their goods carried at the defendants' risk, whereas so far as related to the land carriage they were given that option. According to the finding of the learned judge, a trader who wished to consign his goods from Antwerp to North Woolwich was only given for the higher rate the alternative of the defendants' liability as common carriers during the land carriage from Harwich to North Woolwich, but not during the sea portion of the journey from Antwerp to Harwich. It being one contract of carriage for a single payment, and s. 7 of the Railway and Canal Traffic Act, 1854, being applicable both to the land and sea carriage, the learned judge of the City of London Court held that, inasmuch as no option had been given by the defendants to the plaintiffs so far as the sea portion of the journey was concerned to have the goods carried at the risk of the defendants as ordinary carriers, the contract was not just and reasonable within the meaning of s. 7 as interpreted

by the Courts. In my opinion the learned judge was right, and his judgment must be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Woodhouse & Davidson.*

Solicitor for defendants: *E. Moore.*

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Foreign Judgment—Court in British India—Decree for Divorce and Damages against Co-respondent—Co-respondent domiciled and resident in England—Action by Petitioner to recover upon the Decree for Damages.

The Courts of this country will enforce a foreign judgment in personam ancillary or accessory to a decree for dissolution of marriage, such as a judgment for damages against a co-respondent, regularly pronounced according to the law of the Court which has given it, where both the Court pronouncing and the Court enforcing the judgment are Courts of the same Sovereign and where the Court enforcing it could not grant that relief because it had no jurisdiction over the marriage to the dissolution of which the judgment for damages was ancillary.

The plaintiff, who was a British subject domiciled and resident in British India and had been married there, regularly instituted a suit for divorce in India under the Indian Divorce Act, 1869, making the defendant a co-respondent. The defendant, a domiciled British subject, had then left India and had no property there; he was resident in England and was duly served with the petition by registered post in England, in accordance with the procedure of the Indian Court; he did not appear or defend the suit. A decree was pronounced dissolving the marriage and awarding 7200*l.* as damages to be paid by the defendant to the plaintiff:—

Held, that the plaintiff was entitled to recover the damages awarded by the judgment of the Court in India.

ACTION tried before Scrutton J. without a jury.

The plaintiff claimed the sum of 7200*l.* upon a judgment or decree of the High Court of Judicature at Fort William in Bengal in the Empire of India, being the amount adjudged and decreed to be paid as and by way of damages by the defendant to the plaintiff by a judgment or decree dated September 7, 1911, which was confirmed and made absolute on March 11, 1912.

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The plaintiff was a Christian who was domiciled and resident and had been married in British India. The defendant, a British subject domiciled in England, was resident for many years in India; but he finally left India and returned to England in March, 1910, and had no property in India. In April, 1910, the plaintiff commenced proceedings against his wife for divorce in the High Court of Bengal, alleging her adultery with the defendant, who was joined as co-respondent. Process was duly served on the defendant by registered post in England, but he did not appear or defend. The wife defended, and a decree nisi was made dissolving the marriage and awarding 7200*l.* as damages against the defendant to be paid to the plaintiff, and that decree was subsequently made absolute.

The Indian Divorce Act, 1869 (Act IV.), gives jurisdiction to the Courts in British India to entertain proceedings for divorce where the petitioner is a Christian resident in India who was married in India (s. 2); it provides that the Courts shall in all suits and proceedings thereunder act and give relief on principles and rules which in the opinion of the Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief (s. 7); it requires (with certain exceptions) the alleged adulterer to be made a co-respondent (s. 11); it enables the husband to claim damages from the co-respondent (s. 34); it provides that the petition is to be served on any party affected thereby, either within or without British India, in such manner as the High Court shall direct (s. 50); and the Rules of the High Court provide for the service by post on a defendant resident out of British India.

The decree of the High Court of Bengal "ordered and decreed that the marriage between" the petitioner and his wife "be dissolved" and "further ordered and decreed that the co-respondent . . . do pay to the petitioner the sum of 7200*l.* as and by way of damages."

The defendant in this action raised the defence that the decree of the High Court of Bengal was made against him without jurisdiction, and that it could not be enforced against him in this country.

A. M. Latter, for the plaintiff.

T. C. P. Gibbons, for the defendants.

The arguments appear fully from the judgment. In addition to the cases cited in the judgment, the following cases were referred to during the argument:—*Le Mesurier v. Le Mesurier* (1); *Watkins v. North American Land and Timber Co.* (2); *Wilson v. Wilson* (No. 2) (3); *Douglas v. Forrest* (4); *Re Henderson, Nouvion v. Freeman* (5); *Raulin v. Fischer* (6); *Russell v. Smyth* (7); *Firebrace v. Firebrace* (8); *Yelverton v. Yelverton* (9); *Pemberton v. Hughes*. (10)

Cur. adv. vult.

June 17. SCRUTTON J. (11) The plaintiff claims 7200*l.* against the defendant, being damages awarded to be paid by the defendant to the plaintiff by a judgment of the Bengal High Court in divorce proceedings in which the plaintiff was petitioner and the defendant co-respondent. The defendant replies that before the date when those proceedings commenced he had left India, and the Court pronouncing the judgment had therefore no jurisdiction over him, and he was not bound by their judgment. The plaintiff was an Armenian Christian, born in Persia, who for thirty-three years has lived in British India and who, I find, is domiciled there. He was married to his wife in British India. The defendant is a British subject domiciled in England, who resided in India for nineteen years before March 22, 1910, when he left India for England. On April 20, 1910, the plaintiff caused to be issued in the Bengal High Court a divorce petition against his wife, alleging her adultery with the defendant in India in 1909. The defendant was joined as co-respondent and served with process by registered post in England. He did not appear; the wife defended; after a lengthy trial adultery was proved; and the defendant was condemned in 7200*l.* damages. The Indian Divorce Act, 1869,

(1) [1895] A. C. 517.

(6) [1911] 2 K. B. 93.

(2) (1904) 20 Times L. R. 534.

(7) (1842) 9 M. & W. 810.

(3) (1872) L. R. 2 P. & M. 353.

(8) (1878) 4 P. D. 63.

(4) (1828) 4 Bing. 686.

(9) (1859) 29 L. J. (P. & M.) 34.

(5) (1887) 37 Ch. D. 244; 15 App.

(10) [1899] 1 Ch. 781.

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(11) The judgment was written.

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which appears to be clearly within the legislative authority of the Governor-General in Council, authorizes the Indian Courts, where (a) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (b) where the marriage shall have been solemnized in India (both which conditions are fulfilled in the present case), to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce Court in England gives relief. By s. 11 the petitioner is required to make the alleged adulterer a co-respondent, unless in certain excepted cases which do not apply here. By s. 34 the husband may claim damages from the co-respondent. By s. 50 the petition is to be served on any party to be affected thereby, either within or without British India, in such manner as the High Court shall direct. Rule 25 of Order v. of the High Court Rules provides for the service by post of a summons on a defendant resident out of British India.

The effect of similar provisions in England has been considered by the President of the Probate Division in the recent case of *Rayment v. Rayment* (1), and it appears to follow from that judgment that in British India the judgment in question would be valid though the defendant, the co-respondent, was not resident there at the time of issuing the petition. The President does not decide what effect the judgment would have in the country where the co-respondent was in fact residing, though he suggests (2) that, as regards Scotland, the country of the co-respondent in that case, an English judgment could be enforced under the Judgments Extension Act, 1868. (3) I have now to consider, what the President had not to consider, the effect of such a judgment pronounced in respect of adultery in India against a co-respondent who was not in India at the time of the issue of the petition, when sued on in the United Kingdom, where he is domiciled, both India and the United Kingdom being under the same Sovereign.

In *Emanuel v. Symon* (4) the Court of Western Australia had given judgment against Symon, who had been a partner in a

(1) [1910] P. 271.

(3) 31 & 32 Vict. c. 54.

(2) *Ibid.* at p. 291,

(4) [1908] 1 K. B. 302,

mine in Western Australia, for a balance due on a partnership account. The defendant had been in Western Australia, but had left before the issue of the writ. He was served in England, apparently under procedure similar to our Order xi. The Court held that he was not bound by the judgment, which was not that of a Court of competent jurisdiction over the defendant, who was not a subject of, or domiciled in, or resident, at the issue of the writ, in Western Australia. Buckley L.J. begins his judgment thus (1): "In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained. The question in the present case is whether there is yet another and a sixth case," and then he quotes Fry L.J. "where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction." The judgment in this case cannot be brought within any of the five classes mentioned by Buckley L.J. It was suggested that it came within the first class, for the defendant was a subject of the Sovereign of India and England, but so was the defendant Symon a subject of the Sovereign of Western Australia and England, and it never occurred to any one to argue that this brought the case within the first class, nor, though the fact was obvious, did the Court of Appeal treat it as supporting the judgment that they declined to enforce. *Emanuel v. Symon* (2) clearly binds me to decide this point against the plaintiff.

I think it also binds me to hold that the fact that the procedure of service out of the Indian jurisdiction is authorized by the Indian statute does not itself avail the plaintiff. It is difficult to explain the position and practice of the English Courts. Under our Order xi. we constantly serve out of the jurisdiction, give judgment against absent foreigners, and enforce that judgment

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(1) [1908] 1 K. B. at p. 309.

(2) [1908] 1 K. B. 302.

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against their property within the jurisdiction. But, when we are asked to enforce the judgment of a foreign Court against an Englishman served in the same way, we decline to do so on the ground that such procedure is contrary to the principles of international law. The reason may be that our English procedure is imposed on us by statute, the justice of which it is useless to question, while the foreign procedure is not so imposed and is open to question. If the matter were open for consideration, it is clear to any one who compares our English procedure and the judgment of the Privy Council in *Ashbury v. Ellis* (1) with the judgment of Wright J. in *Turnbull v. Walker* (2) and of the Privy Council in *Sirdar Gurdyal Singh v. Rajah of Faridkote* (3) that there is abundant room for argument.

But in my view the decision of the Court of Appeal in *Emanuel v. Symon* (4), where this point could have been raised, prevents me from considering whether the authorization of service out of the jurisdiction by the local legislation of the Sovereign of the Court pronouncing the judgment makes this judgment binding on the defendant. I have therefore only to consider whether there is anything in the peculiar character of divorce procedure which provides a sixth case where foreign judgments may be enforced. I clearly am not bound by the enumeration of the possible cases by the Court of Appeal in *Emanuel v. Symon* (4) on points which were not argued before them or involved in their decision.

One peculiar point at once strikes the inquirer. The judgment of Lord Selborne in *Sirdar Gurdyal Singh v. Rajah of Faridkote* (5) is based on the general rule "that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('*actio sequitur forum rei*')," and "when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice." In other words, the English Courts will not enforce a German judgment against an Englishman for damages for breach of a contract to be performed in Germany when the Englishman was not in Germany at the issue of process and has not submitted to the

(1) [1893] A. C. 339.

(3) [1894] A. C. 670.

(2) (1892) 67 L. T. 767.

(4) [1908] 1 K. B. 302.

(5) [1894] A. C. 670, 683, 684.

German jurisdiction, for the Englishman can be sued on the contract in his own Courts, which will do justice.

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But this is not the position here. The English Courts will not give damages against this co-respondent, for their jurisdiction is limited to dealing with marriages of persons domiciled in England and the consequences following from the infringement of such marriage ties. The Courts of the country where the defendant resides will not do justice. Why? Because their Sovereign and his Legislatures have entrusted marriages made in India between Christian persons domiciled there and the consequences of interference with such marriages to the Courts in India. I do not know that the fact that there is no remedy against the defendant in England is conclusive in favour of enforcing a foreign judgment, if it is a judgment of a Court not deriving authority from the British Sovereign. One can sue in England for a tort committed abroad, if it is unlawful both by the law of England and the law of the foreign country where the act was done; not if it is only unlawful by the law of the foreign country. But in the case of a foreign judgment for the latter class of tort in proceedings commenced by service out of the foreign jurisdiction, regular by the law of the foreign country, I do not think it would be sufficient to say "this must be enforced, for there is no remedy against the defendant for this tort in the forum rei." The answer would be, "the forum rei does not think such a remedy is required by justice and therefore does not give a remedy itself or enforce your judgment."

But the case is different here. Judgments as to status, such as marriage and its dissolution, are in rem and binding against all the world. The Sovereign assigns to the Courts in the various parts of his dominions the duty of dealing with the validity and dissolution of marriages of persons domiciled within their jurisdiction. As incidental and accessory to decisions on such status the Sovereign gives to his Court the power of inflicting damages and costs on persons who infringe the status of marriage and cause dissolutions of marriage to be granted. The English Court deals with the marriages of English domiciled persons, and inflicts damages on the co-respondent who violates them. The Indian Court deals with marriages solemnized in India, or of

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persons domiciled in India, and inflicts damages on the co-respondent who violates them. What Court has the Sovereign empowered to deal with a co-respondent who violates an English or Indian marriage and leaves the country for another part of the Sovereign's dominions before process is issued against him? According to the defendant here no Court can effectively reach him if he has left no property in India. The English Court, the *forum rei*, cannot touch him, for though it gives damages against adulterous co-respondents it only deals with marriages of persons domiciled in England and co-respondents who violate such marriages. The Indian Court cannot touch him, for though it deals with Indian marriages and dissolves them, it can only touch the co-respondent who violated the marriage if he was in the country when process was issued. The Sovereign, according to the defendant, has failed to do justice here, and the reason for the judgment of the Privy Council in the *Faridkote Case* (1) (that the *forum rei* which can do justice should be resorted to) does not apply.

I do not think the Sovereign has failed to do justice here. Judgments as to status in matters within the jurisdiction of the Court are in rem and bind all the world. Marriage and the dissolution of marriage are matters of status, and the judgments of the Indian Court in this matter are in rem and bind the world: *Bater v. Bater*. (2) Ancillary and accessory to the judgment as to status is the power to give damages against the person causing the marriage to be dissolved. This power is recognized both by the English Courts and the Indian Courts. The English Courts will recognize and enforce the judgments as to status of the Indian Courts in matters within their jurisdiction, and I think they will also recognize and enforce the ancillary orders as to damages, such as they themselves make in similar cases.

For these reasons I think that, in the case at any rate of Courts within the British Empire, a sixth case must be added to the list in *Emanuel v. Symon*. (3) It is not necessary for the purposes of this case to do more than say that the new class at least includes judgments in proceedings in personam ancillary or

(1) [1894] A. C. 670.

(2) [1906] P. 209.

(3) [1908] 1 K. B. 302.

accessory to the dissolution of a marriage of persons domiciled (or otherwise by command of the Sovereign) within the jurisdiction of the Court pronouncing the decree, where both the Court pronouncing the judgment and the Court enforcing it are Courts of the same Sovereign, and where the Court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary, though it can grant similar ancillary relief in the case of dissolution of marriages which are assigned to its jurisdiction by the Sovereign.

It is perhaps dangerous to lay down wider rules than are required by the case before the judge, especially if he suggests his rules are exhaustive; but I am disposed to think that the class may be expressed more widely, at any rate where the Court pronouncing and the Court enforcing judgment are Courts of the same Sovereign, as a class where the judgment is one in rem affecting status or a judgment in personam ancillary or accessory to such judgment in rem, and regularly pronounced by the law of the Courts which have given it. The effect of "foreign" judgments on movables within their jurisdiction, as against the title of persons who have no notice of the proceedings and who have by the law of the Court enforcing a good title to the movables, may come within this class.

For the above reasons I give judgment for the plaintiff for the amount claimed.

Judgment for plaintiff.

Solicitors for plaintiff: *Loughborough, Gedge, Nisbet & Drew.*

Solicitors for defendant: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

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May 27, 28.

[IN THE COURT OF APPEAL.]

BARKER v. LEWIS & PEAT.

Practice—Certificate for Special Jury—“Immediately after verdict”—Juries Act, 1825 (6 Geo. 4, c. 50), s. 34.

The Juries Act, 1825, s. 34, provides that the person or party who shall apply for a special jury shall pay all the expenses occasioned thereby without having any further allowance for the same on taxation than he would be entitled to if the case had been tried by a common jury; “unless the judge before whom the cause is tried shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.”

On January 27, 1913, an action was tried with a special jury. The verdict was for the plaintiff upon one issue and for the defendants upon another. Judgment was given for the plaintiff for a fixed sum with the costs of one issue. Each party was ordered to pay the costs of the issue on which they had failed, and an account, which was not opposed, was directed. No certificate for a special jury was then asked for or given. On April 24, 1913, on an application relating to the account, the defendants' counsel applied for a certificate, and the judge gave it:—

Held, that the judge had not certified in time, for the word “immediately” must be construed literally unless special circumstances prevented the certificate being made or applied for at the trial or the judge expressly reserved his decision on the point, and in either of such cases it should be applied for at the first reasonable opportunity.

Forsdike v. Stone (1868) L. R. 3 C. P. 607, followed.

THIS action was brought by the plaintiff against a firm of stockbrokers, in whose employment he had been, claiming (1.) that he had been engaged upon an agreement that he should be paid 5 per cent. commission upon the net results of one department of the business without any deduction for office expenses; (2.) that this commission had been afterwards raised to 10 per cent.; (3.) that it had been further agreed that the plaintiff should receive 10 per cent. of the profits made on underwriting certain shares. The defendants admitted that the plaintiff was entitled to an account of commission due under (1.), but joined issue on (2.) and (3.). The action was tried before Scrutton J. and a special jury on January 27, 1913. The jury brought in a verdict for the defendants on (2.) and for the plaintiff on (3.). Judgment was entered in favour of the plaintiff

for 340*l.* in respect of issue (3.) and the costs attributable to an action to decide that issue only, and in favour of the defendants for costs on issue (2.), the costs to be set off; and an account was directed of what was due to the plaintiff for commission under (1.), to be taken by an accountant to be agreed on by the parties, or in default of agreement to be appointed by the Court. No certificate for a special jury was then asked for or given.

On April 24, 1913, an application was made to the judge for the appointment of an accountant, and on that application the defendants' counsel asked for a certificate for a special jury at the trial. The judge said that he remembered the case very well and that it was proper to be tried by a special jury, and made the certificate in the order on that application. The plaintiff appealed.

The question depended upon the construction of the Juries Act, 1825, s. 34. (1)

Cecil Walsh, for the appellant. The question is within what time a judge has power to certify for a special jury. This action was tried in January and each party was successful on some points. It turned out on taxation that the plaintiff had to pay more than he expected, and thereupon the defendants, in April, applied for and obtained a certificate for a special jury. The plaintiff submits that the application was made too late and that the learned judge had no longer power to give a certificate. The practice on this point does not appear to be definitely settled. In *Waggett v. Shaw* (2), which was a case under 24 Geo. 2, c. 18, Lord Ellenborough said that the statute provided that the judge should "immediately after the trial certify in open Court," and he refused to give a certificate the next day. By the Juries Act, 1825

(1) The Juries Act, 1825, s. 34, enacts as follows:—"The person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party

would be entitled unto in case the cause had been tried by a common jury; unless the judge before whom the cause is tried shall, immediately after the verdict, certify, under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

(2) (1812) 3 Camp. 316.

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(6 Geo. 4, c. 50), s. 34, the certificate is to be given "immediately after the verdict," and in *Webster v. Appleton* (1) this was held to mean "while the matter is within the mind of the judge who tried it." In *Griffiths v. Griffiths* (2) *Waggett v. Shaw* (3) was followed and *Webster v. Appleton* (1) was dissented from. In *Christie v. Richardson* (4) it was held that the words meant within a reasonable time. In *Forsdike v. Stone* (5), in which all the authorities were cited, it was held that a certificate could not be granted ten days after the trial, and the Court followed *Grace v. Clinch* (6) and *Leech v. Lamb* (7), and refused to follow *Jones v. Williams*. (8)

A. A. Roche, K.C., and Morton Smith, for the respondents. This certificate was not asked for at the trial because it was not realized that final judgment was being given. The practice appears to have been different in the different Divisions of the High Court. In the Queen's Bench no delay was allowed; in the Exchequer Division the certificate had to be given whilst the matter was fresh in the judge's mind, and in the Common Pleas a reasonable latitude might be given: *Serrell v. Derbyshire, &c. Ry. Co.* (9) Now the certificate can be given some time after the trial, e.g., after further consideration: Rules of the Supreme Court, 1883, Order xxxvi., r. 7 (d). *Forsdike v. Stone* (5) does not follow the older cases. The certificate in question there was one that a slander was wilful and malicious. The only reasonable rule is that the certificate should be given when the facts are fresh in the judge's mind. In this case the judge said that he remembered all about the case.

Cecil Walsh in reply.

KENNEDY L.J. My Lord has asked me to give judgment first in this case.

I am of opinion that this appeal must be allowed. The words of the statute are clear and precise enough in form. [His Lordship read the section set out above, and continued:] In the

(1) (1890) 62 L. T. 704.

(2) (1898) 14 Times L. R. 184.

(3) 3 Camp. 316.

(4) (1842) 10 M. & W. 688.

(5) L. R. 3 C. P. 607.

(6) (1843) 4 Q. B. 606.

(7) (1855) 11 Ex. 437; 25 L. J. (Ex.)

17.

(8) (1844) 13 M. & W. 420.

(9) (1851) 10 C. B. 910.

present case there was an action tried and the jury found a verdict upon certain issues. It was agreed between the parties that there were certain matters concerning which an account would have to be taken, and the substantial issue involved in the trial before the jury was the basis upon which that account should be taken. The issues were decided by the verdict of the jury and the matter stood there, no application being made for a certificate by the judge for a special jury. Then three months afterwards, when, as I am told, the taxation was proceeding but was not completed, for the first time an application was made to the learned judge by the respondents to this appeal for a certificate for a special jury, and the learned judge has given that certificate, and the question is whether he was entitled so to do. In my opinion he was not. We have been assisted by counsel by the citation of a number of cases, some of which may be said to be, or may arguably be put as being, not quite in accordance with others, but it seems to me that there is not such a conflict as is represented if you take for example the two cases which have been cited as being in conflict, the cases of *Christie v. Richardson* (1), in the Exchequer, and of *Leech v. Lamb* (2), which came up in the same Court thirteen years later. Now the word in the statute is "immediately"; but there is no doubt that the word "immediately" has been construed and may in my judgment be construed to mean as immediately as the circumstances permit. There are circumstances which might in the ordinary and natural course of things prevent the judge from giving that certificate in the literal sense immediately, that is directly after the verdict is pronounced. In such cases I think you may say that there is a real adhesion to the rule if the act required is done by the judge as soon as it is reasonable that it should be done. One naturally rests a great deal in a matter of this kind upon the judgment of Willes J. in *Forsdike v. Stone* (3), where, dealing with the question of a certificate of costs (and in that particular case saying that the certificate was not in time), he says: "Such being the circumstances of the verdict, no certificate for costs was

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(1) 10 M. & W. 688. (2) 11 Ex. 437; 25 L. J. (Ex.) 17.

(3) L. R. 3 C. P. 607, 611.

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applied for at the time: such an application is not necessary, but it is usual, in order to remind the judge of his power, and to induce him to use it. The judge did not announce his intention to consider the matter so as to fix the defendant with notice, and nothing passed till ten days afterwards, when, at another town, the application for a certificate was made, and it was granted. There was nothing to prevent the judge certifying at the time, or an application being made to him with that view. If such circumstances had existed, it might have been said that whenever an opportunity first occurred of making the application, or of the judge certifying, that was within 'a reasonable' time; but no such question arises here, and, putting the widest construction on the words 'immediately afterwards,' it would be contrary to fact to say that the certificate was so granted in this case. The rule to set aside the certificate must, therefore, be made absolute." I am content to adopt that view of Willes J. But I can conceive one other case, and that is where the application is made to the judge by counsel immediately, but the judge says "I will tell you what I decide about this to-morrow morning," or in a short time. In that case I think the judge would be justified in certifying that he had made up his mind at the time mentioned, treating the giving of the certificate as a thing done nunc pro tunc. But taking the general rule as stated by Willes J. of a reasonable interpretation of the words "immediately after," it appears to me that as in *Forsdike v. Stone* (1) so in this case there has been nothing caused by circumstances which will justify my brother Scrutton in giving a certificate three months afterwards on the application of one of the parties.

I only desire to add that that seems to be the view which has been taken comparatively recently, as by Butt J. in *Webster v. Appleton* (2), where two cases were cited to him, *Christie v. Richardson* (3) on the one side, and *Grace v. Clinch* (4) on the other. But as to *Christie v. Richardson* (3) it is to be observed that, while in that case the Court held that the words as to the certificate being given by the judge may be construed to mean

(1) L. R. 3 C. P. 607.
(2) 62 L. T. 704,

(3) 10 M. & W. 688
(4) 4 Q. B. 606.

within a reasonable time, as far as I can see from the report the date when the certificate was in fact given was not before the Court. Looking, however, at the later case of *Leech v. Lamb* (1) it was apparent that inquiry as to this had been made in some way or other, because in that case Alderson B. is reported in the *Law Journal* (1) as informing counsel and the Court that in *Christie v. Richardson* (2) the certificate was given on the following morning, and that was held sufficient to satisfy the words of the statute; so there was very little delay, and the learned judge went on to say the certificate might be said to be given immediately because nothing intermediate had occurred. *Christie v. Richardson* (2) therefore is really no authority for what one may call an indefinite postponement of the certificate, and I think the current of modern authorities is in favour of the view which I certainly prefer, that the passage quoted from Willes J. is the proper explanation of the word "reasonable" as applied in *Christie v. Richardson* (2), and the facts of this case do not bring it within that explanation.

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COZENS-HARDY M.R. I agree.

Appeal allowed.

Solicitors : *Sweepstone, Stone, Barber & Ellis ; C. J. Smith & Hudson.*

(1) 25 L. J. (Ex.) 17.

(2) 10 M. & W. 688.

J. R. B.

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June 2.

THE KING *v.* LEACH AND ANOTHER.*Ex parte* FRITCHLEY.

Justices—Summary Jurisdiction—Fine—Default of Sufficient Distress—Imprisonment—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), ss. 66, 99—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5.

Sect. 65, sub-s. 2 (a), of the Licensing Act, 1910, provides that the penalty for an offence under the section shall be a fine not exceeding 50*l.* or imprisonment with or without hard labour for a term not exceeding one month. Sect. 99 provides that "Except as otherwise expressly provided, any offence under this Act may be prosecuted, and every fine or forfeiture may be recovered and enforced, in manner provided by the Summary Jurisdiction Acts."

The Summary Jurisdiction Act, 1879, s. 5, provides that the period of imprisonment imposed in respect of the default of a sufficient distress to satisfy a sum of money adjudged to be paid by a conviction shall, where the sum exceeds 20*l.*, not exceed three months.

The defendant was convicted of an offence under s. 65 of the Act of 1910 and ordered to pay a fine of 25*l.*, and in default of payment and of sufficient distress to be imprisoned for three months:—

Held, that although under s. 65 a sentence of imprisonment for the offence could not have exceeded one month, there was power under s. 5 of the Act of 1879 to impose a sentence of three months' imprisonment for non-payment of the fine and in default of sufficient distress.

Reg. v. Hopkins [1893] 1 Q. B. 621, followed.

RULE NISI to justices of the peace for the county of Derby to shew cause why a writ of certiorari should not issue to bring up and quash three convictions dated March 7, 1913, of one William Fritchley.

By the first conviction Fritchley was convicted "for that he on August 31, 1912, at Newton in the said county unlawfully did sell by retail certain intoxicating liquor to wit beer which he was not then licensed to sell by retail contrary to the form of the statute in such case made and provided. (1) And it

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65: "(1.) Subject to the provisions of this Act, a person shall not sell or expose for sale by retail any intoxicating liquor unless he holds a justices licence authorizing him to

hold an excise licence for the sale of that intoxicating liquor, nor at any place except that for which the justices' licence authorizes him to hold an excise licence for the sale of that liquor."

"(2.) If any person acts in contra-

is adjudged that the defendant for his said offence do forfeit and pay the sum of twenty-five pounds and do also pay the further sum of two pounds three shillings and sixpence for costs on March 14, 1913. And in default of payment it is adjudged that the sums due under this adjudication be levied by distress and sale of the defendant's goods, and in default of sufficient distress that the defendant be imprisoned in His Majesty's prison at Derby for the space of three months unless the said sums and all costs and charges of the said distress and of his commitment be sooner paid."

The second and third convictions were in respect of similar offences committed on September 1, 1912, and January 27, 1913, and in both cases a fine of 25*l.* was ordered to be paid, and a sentence of three months' imprisonment in default of sufficient distress was imposed, the three months to run concurrently and to commence after the expiration of the three months' imprisonment ordered by the first conviction.

The defendant did not pay any of the fines or costs, and in default of distress was arrested and committed to Derby gaol.

The rule nisi was granted on the ground that the convictions were bad in law and on the face of them in that the justices had no jurisdiction to impose the sentences of three months' imprisonment therein contained.

Grimwood Mears, for the justices, shewed cause against the rule. Under s. 65, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910, the penalty for a contravention of the section is either a fine not exceeding 50*l.* or imprisonment with or without hard labour for a term not exceeding one month. In this case the justices imposed a fine of 25*l.* for each offence. Sect. 99 of the Act provides that the fine may be "recovered and enforced in

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vention of this section he shall be liable in respect of each offence—
(*a*) in the case of the first offence to a fine not exceeding 50*l.*, or to imprisonment, with or without hard labour, for a term not exceeding one month"

Sect. 99: "Except as otherwise expressly provided, any offence under this Act may be prosecuted and every fine or forfeiture may be recovered and enforced in manner provided by the Summary Jurisdiction Acts."

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manner provided by the Summary Jurisdiction Acts." Sect. 5 of the Summary Jurisdiction Act, 1879 (1), contains a scale of the terms of imprisonment which may be imposed in respect of the non-payment of a fine or in respect of the default of sufficient distress to satisfy the fine. According to that scale, where the fine exceeds 20*l.*, a term of three months' imprisonment may be imposed. The justices were therefore acting within their jurisdiction in the present case in imposing sentences of three months' imprisonment in default of sufficient distress. It is no doubt an anomaly that, although a sentence of one month is the most that could be inflicted for the offence itself, for non-payment of the fine three months' imprisonment may be ordered. A similar question arose in *Reg. v. Hopkins* (2), under s. 77 of the Metropolitan Police Act, 1839, and s. 1 of the Street Music Act, 1864, and it was held by Lord Coleridge C.J. and Bruce J. that although the offence was punishable with imprisonment for three days only, s. 77 of the Act of 1839, the language of which is similar to that of s. 5 of the Summary Jurisdiction Act, 1879, authorized the imposition of one month's imprisonment for non-payment of the fine. [He also referred to s. 5 of the Summary Jurisdiction Act, 1884.]

L. J. Sturge, for the defendant, in support of the rule. Under s. 21, sub-s. 3, of the Summary Jurisdiction Act, 1879, a Court of summary jurisdiction to which application is made for the issue of a distress warrant in default of payment of a fine may, if it think fit, order the defendant on non-payment to be imprisoned for any period not exceeding the period for which he could have been imprisoned for the original offence. That power

(1) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 5: "The period of imprisonment imposed by a Court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the non-payment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall notwithstanding any enactment to the contrary in any past Act be such period

as in the opinion of the Court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale; that is to say, where the amount of the sum or sums of money adjudged to be paid by a conviction, as ascertained by the conviction exceeds twenty pounds the said period shall not exceed three months."

(2) [1893] 1 Q. B. 621.

could have been exercised in this case, although the issue of the distress warrant was made at the time of the conviction and not on a subsequent application. It was therefore in the power of the justices to have committed the defendant to prison for one month in default of distress, that being the term imposed by s. 65 of the Act of 1910. Sect. 99 of that Act only applies "except as otherwise expressly provided." The effect of reading s. 21, sub-s. 1, of the Act of 1879 with s. 65 of the Act of 1910 is that the term of imprisonment for default of distress is otherwise provided for, and s. 5 of the Act of 1879 has, therefore, no application, and the justices had no jurisdiction to make an order for imprisonment which can only be justified under that section.

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DARLING J. In my opinion this rule must be discharged. Until our attention was called to s. 21, sub-s. 3, of the Summary Jurisdiction Act, 1879, by Mr. Sturge in his ingenious argument, there appeared to me to be no reason which would lead me to hesitate in saying that the question raised in this case was covered by the decision of this Court in *Reg. v. Hopkins*. (1) Having heard and considered Mr. Sturge's argument, I am still of opinion that the argument used by the Court in that case applies to the present case, as well as the observations of Lord Coleridge C.J. that it is a great anomaly to hold that a man can be sent to prison for a longer time if he is merely fined for an offence than he could be if he in the first instance received a sentence of imprisonment for the offence itself, but that only Parliament could remove the anomaly by repealing or amending its statutes. That was said in 1893, and seventeen years afterwards, namely, in 1910, when the Licensing (Consolidation) Act, 1910, was passed, Parliament had an opportunity of remedying the anomaly which Lord Coleridge referred to, but Parliament did not do so; on the contrary, it deliberately re-enacted it in the same form as that in which it was at the date of the decision of *Reg. v. Hopkins* (1), for by s. 99 of that Act it is provided that "Except as otherwise provided, any offence under this Act may be prosecuted and every fine or forfeiture may be recovered and enforced in manner provided by the Summary Jurisdiction Acts." Sect. 65 of the Act does not

(1) [1893] 1 Q. B. 621.

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otherwise provide as to the method of recovering fines imposed in respect of the contravention of that section, and, therefore, the Summary Jurisdiction Acts apply. By s. 5 of the Act of 1879 a scale of imprisonment is provided varying with the amount of the fine, and under that scale, where the fine exceeds 20*l.*, in the event of non-payment and in default of sufficient distress the term of imprisonment may be three months. I agree that the justices were not bound to impose a sentence of three months' imprisonment; they might, when a distress warrant was applied for, have taken advantage of s. 21, sub-s. 3, of the Act of 1879, and considered whether the defendant had sufficient goods to satisfy a distress, and if it appeared that he had not, a sentence of one month's imprisonment only might have been imposed. It may be that this would have been the best exercise of the justices' judicial discretion, but before pronouncing a definite opinion as to that one would require to know more of the facts. It may be that the justices thought that the defendant, having no goods on which a distress could be levied, was a person who was willing to break the law and take the consequences. In the circumstances I see no reason for saying that the order which the justices did make was beyond their jurisdiction, and the rule nisi must therefore be discharged.

BANKES J. I agree.

LUSH J. I am of the same opinion.

Rule discharged.

Solicitors for justices : *Speckly, Mumford & Craig, for W. Mortimer Wilson, Alfreton.*

Solicitors for defendant : *Campion & Co., for Neal & Co. Sheffield.*

F. O. R.

Ex parte BEECHAM

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June 6.

Motor Car—Offence—Owner—Refusal to give Information as to Driver—Conviction—Omission to specify Offence committed by Driver—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1, sub-s. 3.

In the conviction of the owner of a motor car under sub-s. 3 of s. 1 of the Motor Car Act, 1903, for refusing to give information which may lead to the identification of the driver, it is sufficient to state generally that the driver had committed an offence under sub-s. 1 without more particularly specifying that offence.

MOTION for a rule nisi for a writ of certiorari.

The applicant was summoned to appear and answer an information for that he, being the owner of a motor car the driver of which had within the county borough of Warrington committed an offence under s. 1, sub-s. 1, of the Motor Car Act, 1903, did unlawfully fail, when required by the chief constable so to do, to give him certain information which it was in his power to give which might lead to the identification of the driver of the car, contrary to the provisions of the statute. (1)

At the hearing before the justices objection was taken on behalf of the applicant that the information and summons thereunder were defective because they did not specify which of the four offences enumerated in s. 1, sub-s. 1, it was alleged that the driver of the car had in fact committed and did not sufficiently specify the place where such offence had been committed. The justices overruled the objections and convicted and fined the

(1) 3 Edw. 7, c. 36, s. 1, sub-s. 1: "If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

Sub-s. 3: "If the driver of any car who commits an offence under this section refuses to give his name or address, or gives a false name or address, he shall be guilty of an offence under this Act, and it shall be the duty of the owner of the car, if required, to give any information which it is within his power to give, and which may lead to the identification and apprehension of the driver, and if the owner fails to do so he also shall be guilty of an offence under this Act."

1913 applicant. The conviction followed precisely the terms of the information and summons.

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The applicant thereupon applied for a rule nisi for a writ of certiorari to bring up the conviction to be quashed.

J. Sankey, K.C. (W. H. Moresby and J. B. Hissey with him), for the applicant. This conviction is bad because it does not specify the offence which the driver of the motor car committed. Four separate offences are created by s. 1, sub-s. 1, of the Motor Car Act, 1903, and the particular offence charged against a driver, if he is prosecuted, must be specified: *Rex v. Wells*. (1) The conviction of an owner under sub-s. 3 must state the offence which the driver has committed; and in *Rex v. Hankey* (2), which was followed in *Rex v. Chancellor* (3), the conviction was quashed because it did not state the offence committed by the driver. [He referred to *Smith v. Moody*. (4)]

BANKES J. In my opinion there is no ground for granting a rule. The applicant was summoned, under sub-s. 3 of s. 1 of the Motor Car Act, 1903, upon an information which alleged that the driver of his motor car had committed an offence under s. 1, sub-s. 1, of the Act, and that he, being the owner, had unlawfully failed to give the chief constable certain information which it was in his power to give which might lead to the identification of the driver of the car. Before the justices the objection was taken on behalf of the applicant that the information and summons did not define the offence which had been committed by the driver. It may be that it did not, but it seems to me that the proper remedy of a person who is really embarrassed by the lack of such information is to ask the justices to adjourn the case to enable him to obtain the information which may be necessary in order to meet the charge. That was not done in this case, and the affidavit of the applicant does not say that he was embarrassed in his defence. This objection, therefore, is a purely technical one to the form of the summons and conviction, and I do not think that there is any substance in it. The cases

(1) (1904) 68 J. P. 392.

(2) [1905] 2 K. B. 687.

(3) (1905) 69 J. P. 383.

(4) [1903] 1 K. B. 56.

which have been cited do not touch the point here. It is a condition precedent to the conviction of the owner under sub-s. 3 that the driver should have committed an offence under sub-s. 1; but, in my opinion, it is quite sufficient to allege the fulfilment of that condition precedent in general terms, as was done in this case. Here, after so alleging the fulfilment of the condition precedent, the conviction goes on to state definitely the offence of which the applicant was convicted, that is, the refusal to give information which it was in his power to give which might lead to the identification of the driver. This case is clearly distinguishable from that of a man who is prosecuted under sub-s. 1, in which case he is certainly entitled to have the offence with which he is charged and of which he is convicted recorded on the face of the conviction.

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LUSH J. I am of the same opinion. It is obviously of great importance that a man shall be told with sufficient particularity what is the offence of which he is convicted; but the present applicant was told with the utmost particularity what was the offence with which he was charged and he was told that the driver had committed an offence under sub-s. 1. It cannot matter to the owner what was the locality in which the driver drove at an excessive speed, because the owner's offence is refusing to give information which may lead to identification of the driver. In my opinion there is no possible ground for saying that the summons or conviction is bad.

*Rule refused.*Solicitors for applicant: *Firth & Co.*

J. H. W.

C. A.

[IN THE COURT OF APPEAL.]

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April 28, 29;
May 7.THE DUKE OF BEAUFORT *v.* THE COMMISSIONERS
OF INLAND REVENUE.THE COMMISSIONERS OF INLAND REVENUE *v.* THE
MARQUESS OF ANGLESEY.

*Revenue—Mineral Rights Duty—Rental Value—Rent paid by Working Lessee
in last Working Year—Arrears of Rent—Landlord's Property Tax—
Super-tax—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 20, 66.*

By s. 20 of the Finance (1909-10) Act, 1910, mineral rights duty is charged on the rental value of all rights to work minerals. Where the right to work the minerals is the subject of a mining lease, the rental value is the amount of rent paid by the working lessee in the last working year in respect of that right.

The Marquess of Anglesey was the grantor of a mining lease at a yearly rent of 150*l.* In the year ending September 30, 1911 (which was the last working year for the purposes of the case), he received from the lessees a sum of 141*l.* 5*s.*, being 150*l.* for rent up to April 5, 1911, less 8*l.* 15*s.* deducted by the lessees in respect of income tax:—

Held, that the amount of rent paid by the working lessees was the sum of 141*l.* 5*s.*, and not the sum of 150*l.*, and consequently that the former and not the latter sum constituted the rental value upon which mineral rights duty was chargeable.

The Duke of Beaufort was the grantor of a mining lease at a yearly rent of 500*l.* In the year ending September 30, 1909 (which was the last working year for the purposes of the case), he received from the lessees 356*l.* 5*s.* in respect of three quarters' rent in arrear for the year 1907. The Act came into force on April 29, 1910:—

Held, that mineral rights duty was payable on the 356*l.* 5*s.* arrears of rent.

By s. 66 of the Act there is charged for the year therein specified in respect of the income of any individual the total of which from all sources exceeds 5000*l.* an additional duty of income tax referred to in the Act as super-tax. For the purposes of super-tax the total income of any individual from all sources is the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts.

It being assumed that the Duke of Beaufort was liable to pay super-tax:—

Held, that in order to arrive at the rental value of the mineral

rights aforesaid the amount of super-tax was not to be deducted from the above sum of 356*l.* 5*s.*

Decision of Hamilton J. [1912] 2 K. B. 281, affirmed.

THESE two appeals were heard together and decided by the same judgment.

THE DUKE OF BEAUFORT *v.* THE COMMISSIONERS OF INLAND
REVENUE.

Appeal from a decision of Hamilton J. (1)

Appeal under s. 33, sub-s. 4, of the Finance (1909-10) Act, 1910, from the decision of a referee stated at the request of the parties in the form of a special case, from which the following facts appeared :—

The Duke of Beaufort, the appellant, was assessed for mineral rights duty under s. 20 of the Finance (1909-10) Act, 1910 (2),

(1) [1912] 2 K. B. 281.

(2) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 20 : “(1.) There shall be charged, levied, and paid for the financial year ending the thirty-first day of March, 1910, and every subsequent financial year on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value.

“(2.) The rental value shall be taken to be :—

“(a) Where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in the last working year in respect of that right; and

“(b) Where the minerals are being worked by the proprietor thereof, the amount which is determined by the Commissioners to be the sum which would have been re-

ceived as rent by the proprietor in the last working year if the right to work the minerals had been leased to a working lessee for a term and at a rent and on conditions customary in the district, and the minerals had been worked to the same extent and in the same manner as they have been worked by the proprietor in that year

“Provided that if in any special case it is shown to the Commissioners that the rent paid by a working lessee exceeds the rent customary in the district, and partly represents a return for expenditure on the part of any proprietor of the minerals which would ordinarily have been borne by the lessee, the Commissioners shall substitute as the rental value of the right to work the minerals or the mineral wayleaves, as the case may be, such rent as the Commissioners determine

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C. A. for the year 1909-10 upon certain mineral rights upon a rental value of 500*l.*, and duty amounting to 25*l.* was charged thereon.

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The mineral rights were included in a lease dated May 25, 1908, and made between the appellant and the Copper Pit Collieries, Limited, whereby the appellant leased the veins of coal there mentioned to the colliery company for a period of forty-two years from September 29, 1906, at a fixed yearly rent (after the first quarter) of 500*l.* payable quarterly on March 25, June 24, September 29, and December 25 in each year.

On October 2, 1908, the appellant received from the colliery company a sum of 356*l.* 5*s.*, but except for that sum during the period commencing October 1, 1908, and ending September 30, 1909, he received no other payment under the lease.

The sum of 356*l.* 5*s.* represented arrears of fixed rent which had become due and payable under the lease for the three quarters of a year ending September 29, 1907. The rent reserved by the lease for those three quarters amounted to 375*l.*, but from this a sum of 18*l.* 15*s.* had been deducted by the colliery company in respect of income tax paid by them to the Crown.

It was agreed that the appellant was to be treated for the purposes of this case as if, under s. 66 of the Finance (1909-10) Act, 1910, he had been assessed in respect of super-tax at the rate of 6*l.* in the pound for the year beginning April 6, 1909, and as if the said sums of 356*l.* 5*s.* and 18*l.* 15*s.* had been taken into account for the purpose of such assessment, and the appellant had paid in respect thereof super-tax to the amount of 9*l.* 7*s.* 6*d.*

would have been the rent customary in the district if the expenditure had been borne by the lessee."

Sect. 66: "(1.) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, 1909 in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this

Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds 3000*l.*

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts"

On behalf of the Commissioners it was admitted that the assessment must be reduced from 500*l.* to 375*l.* in any event.

On behalf of the appellant it was contended :—

(a) That the assessment was wholly void as being an assessment upon arrears of rent due and payable prior to October 1, 1908.

(b) That the amount deducted by the colliery company in respect of income tax ought not to be included for purposes of assessment, but that such assessment ought to be made on the amount of rent actually received by the appellant.

(c) That the super-tax received by the Crown from the appellant in respect of the premises should not be included in the amount on which the assessment was made, or alternatively that relief to the extent of the amount of such super-tax should be given to the appellant.

On behalf of the Commissioners it was submitted that all the above contentions were erroneous.

The referee decided that the above contentions were erroneous, and awarded that the assessment was to stand at the amount agreed to by the Commissioners, namely, 375*l.* If in the opinion of the Court the said arrears of fixed rent ought not to have been included for purposes of assessment, then the award was to be quashed.

If in the opinion of the Court the said arrears were properly brought into assessment but the amount of income tax deducted by the colliery company ought not to have been included, then the award should be varied by providing that the rental value be reduced to 356*l.* 5*s.* and the mineral rights duty to 17*l.* 16*s.* 3*d.*

If in the opinion of the Court the said arrears were properly brought into assessment but the amount of super-tax above mentioned ought not to have been included, or if under the Act there was power for the Commissioners to give relief in the premises, then the award was to be varied by providing that the rental value mentioned in the assessment be reduced to 346*l.* 17*s.* 6*d.* and the mineral rights duty to 17*l.* 6*s.* 10½*d.*

Hamilton J. held that the rental value on which mineral rights duty was payable was 356*l.* 5*s.* only ; that the amount of

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- C. A. super-tax ought not to be deducted ; and that duty was payable
 1913 on the 356*l.* 5*s.* although that sum represented arrears of rent
 accrued due before the Finance (1909-10) Act, 1910, came
 BEAUFORT into operation.
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 INLAND The Commissioners appealed, and the Duke of Beaufort gave
 REVENUE notice of a cross-appeal on the question whether mineral rights
 COMMIS- duty was payable on any arrears of rent due for a period
 SIONERS. before the Act came into operation, and whether super-tax ought
 INLAND to be deducted.
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 ANGLESEY It appeared that the 18*l.* 15*s.* was paid to the Crown before
 (MARQUESS). the Act came into operation. The Commissioners therefore
 abandoned their appeal on this point, and the question of
 deducting from the rental value the amount paid by the tenant
 for income tax after the commencement of the Act was argued
 in Lord Anglesey's case.

COMMISSIONERS OF INLAND REVENUE *v.* MARQUIS OF
 ANGLESEY.

Appeal from a decision of Horridge J.

The Marquis of Anglesey was assessed for mineral rights duty under s. 20 of the Finance (1909-10) Act, 1910, for the year 1911-12 upon certain mineral rights in the assessment mentioned upon a rental value of 150*l.*, and duty amounting to 7*l.* 10*s.* was charged thereon.

The mineral rights were included in a lease dated December 29, 1881, and made between the appellant's predecessor in title and the lessee therein named, whereby the lessor leased to the lessee the mines and minerals there mentioned for a period of sixty years from January 5, 1881, at a fixed yearly minimum mine rent of 150*l.* payable quarterly on April 5, July 5, October 5, and January 5 in each year as therein provided. The lease contained a covenant by the lessee to pay the rent thereby reserved in manner provided by the lease without any deduction or abatement except the landlord's property tax, and a similar covenant to pay all rates, taxes, assessments, and impositions except the landlord's property tax.

On May 27, 1911, the appellant received from the successors of the lessee the sum of 141*l.* 5*s.*, but except for such sum

during the period commencing October 1, 1910, and ending September 30, 1911, he received no other payment under the lease.

This sum of 141*l.* 5*s.* represented four quarters' rent up to April 5, 1911, reserved by the lease, less the sum of 8*l.* 15*s.* deducted by the lessees in respect of income tax paid by them to the Crown.

The lessees had been assessed for income tax upon their profits including the profits from the said minerals for the year 1910-11 in a sum largely exceeding the said sum of 8*l.* 15*s.*, and had on March 28, 1911, paid such income tax to the Crown.

On behalf of Lord Anglesey it was contended that the amount deducted by the lessees in respect of income tax ought not to be included for purposes of assessment, but that such assessment ought to be made on the amount of rent actually received by him.

On behalf of the Commissioners it was submitted that the lessees had in the period in question paid the total rent reserved, namely, 150*l.*, and that the assessment was correct.

Horridge J. followed the decision of Hamilton J. in *Duke of Beaufort v. Inland Revenue Commissioners* (1) without expressing any opinion of his own, and held that duty was payable on 141*l.* 5*s.* only.

The Commissioners appealed.

Sir J. Simon, S.-G., and *W. Finlay*, for the Crown. The first point arises on Lord Anglesey's case. Horridge J. has held, following Hamilton J., that the words "rent paid" in s. 20, sub-s. 2 (a), of the Finance (1909-10) Act, 1910, ought to be limited to the amount which actually reaches the landlord, and that the amount of the income tax paid by the tenant ought to be deducted in calculating the rental value for the purpose of assessing the mineral rights duty. It is submitted that that is wrong. Although by the machinery of collection the tenant pays the income tax, it is in reality paid by the landlord. If the tenant were sued by his landlord he could plead payment of his rent to the extent of the tax paid by him: *Waller v. Andrews*. (2)

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(2) (1838) 3 M. & W. 312.

C. A. Sect. 20 does not make the amount actually handed over in
 1913 cash the basis of rental value; if it did, duty might be evaded by
 BEAUFORT set-off. When the lessee pays the tax he pays the rent pro tanto
 (DUKE) in advance: *Denby v. Moore* (1); *Cumming v. Bedborough* (2);
 v. *In re Sturmev Motors, Ltd.* (3) The rent is none the less paid
 INLAND because a portion of it is paid to the revenue. The whole
 REVENUE scheme of the Income Tax Acts is, where possible, to tax
 COMMIS- at the source. The tenant is accordingly made liable
 SIONERS. to pay the tax in the first instance, but he is entitled to
 INLAND deduct the amount from his rent, and is acquitted and dis-
 REVENUE charged of the amount of such deduction as if it had been actually
 COMMIS- paid to the landlord. The same thing applies to annual payments
 SIONERS of all kinds, such as interest, dividends, and annuities: Income
 v. Tax Act, 1842, ss. 54, 60, Sched. A, No. IV., r. 9, s. 102;
 ANGLESEY Income Tax, 1853, s. 40; Customs and Inland Revenue Act,
 (MARQUESS). 1888, s. 24.

The tax is got from the tenant, but the statute recognizes that it is the landlord who bears it: Income Tax Act, 1842, s. 163; Finance Act, 1898, s. 8.

[KENNEDY L.J. In *Bramston v. Robins* (4) Park J. says: "This was as much a payment as if the tenants had paid down the whole rent, and the landlord had returned the amount of the land tax."]

That is putting our case as high as possible.

Danckwerts, K.C., and *Micklethwait*, for the Duke of Beaufort and the Marquis of Anglesey. Mineral rights duty is not payable on the sum deducted by the lessees in respect of income tax. The amount of income tax paid by the lessees and deducted from the rent is not "rent paid by the working lessee" within s. 20, sub-s. 2 (a). It is the Crown's share of the profits of the venture. It does not form part of the rent: *London County Council v. Attorney-General* (5); *Ashton Gas Co. v. Attorney-General* (6), affirming *Attorney-General v. Ashton Gas Co.* (7) It is immaterial to what purposes the profits are applied; the

(1) (1817) 1 B. & Ald. 123.

(2) (1846) 15 M. & W. 438.

(3) [1913] 1 Ch. 16.

(4) (1826) 4 Bing. 11, at p. 16.

(5) [1901] A. C. 26, 35, 45.

(6) [1906] A. C. 10.

(7) [1904] 2 Ch. 621.

Crown is entitled to its share as and when earned : *Coltress Iron Co. v. Black* (1); *Mersey Docks v. Lucas*. (2) C. A.
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[BUCKLEY L.J. If it is the Crown's share of the profits, and the tenant pays it and omits to deduct it, why is he not entitled to recover it afterwards?]

Because it is part of the statutory machinery for collection of the tax. A lessor is not constituted a debtor to the Crown by the Income Tax Acts. Therefore Lord Anglesey has to pay duty on 141*l.* 5*s.* only. The subject is not to be taxed without clear words for that purpose : *Attorney-General v. Earl of Selborne*. (3)

In the Duke of Beaufort's case the matter is complicated by the question of arrears. The financial year ending March 31, 1910, was the first financial year under the Act of 1910. Mineral rights duty became payable for that year on the rental value of the right to work minerals, that is to say, on the amount of rent paid by the working lessee in the last working year in respect of that right. By s. 24 of the Act the expression "working year" means the year ending September 30, and the expression "last working year" means the working year completed immediately before January 1 in any financial year for which the duty is paid. The financial year for which the duty is paid in the Duke of Beaufort's case is the year ending March 31, 1910; the last working year, therefore, is the year ending September 30, 1909. October 2, 1908, fell within that year, and on that day three quarters' arrears of rent for the year 1907 were paid. The Crown claim mineral rights duty on that rent because it was de facto paid on October 2, 1908, although it was due and payable on or before September 29, 1907. The Act does not purport to charge any rental value before October 1, 1908, and it was not intended to have a retrospective operation. An Act of Parliament will not be read retrospectively unless the intention of the Legislature is clear and unequivocal : *Gardner v. Lucas* (4); *Reid v. Reid* (5); *Reg. v. Ipswich Union* (6); *Midland Ry. Co. v. Pye*. (7) The rental value is the annual rental value

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(1) (1881) 6 App. Cas. 315.

(2) (1883) 8 App. Cas. 891.

(3) [1902] 1 K. B. 388, 399.

(4) (1878) 3 App. Cas. 582, 600.

(5) (1886) 31 Ch. D. 402, 408.

(6) (1877) 2 Q. B. D. 269.

(7) (1861) 10 C. B. (N.S.) 179, 191.

C. A. for the year for which the assessment is made and is the
 1913 amount of rent paid in the last working year in respect of the
 BEAUFORT right to work minerals, and paid by a working lessee who pays
 (DUKE) his rent regularly and punctually. This is borne out by the
 v. proviso to s. 20 which in certain cases makes the rent
 INLAND REVENUE customary in the district the true measure of the rental value.
 COMMIS- Therefore these arrears are not liable to mineral rights duty at all.
 SIONERS. A lessor ought not to be penalized because he was lenient to his
 INLAND REVENUE tenant and did not enforce payment when the rent fell due. A
 COMMIS- landowner who lets his minerals ought not to be in a worse position
 SIONERS. than one who works them himself and is only assessed on the
 v. basis of what he gets in each working year. The rental value of
 ANGLESEY mines varies from day to day and is liable to become exhausted.
 (MARQUESS). Therefore the value is the rent during the last working year.

Upon the cross-appeal it is submitted that the amount of the super-tax ought also to be deducted in arriving at the rental value. Super-tax is only a part of the income tax and stands upon the same footing: *Bowles v. Attorney-General*. (1) Super-tax is the Crown's share of the income of the subject above the limit. Therefore mineral rights duty, which is a tax upon the individual, ought not to be levied upon the super-tax.

Sir John Simon, S.-G., in reply, was not called upon on the question of super-tax. The question is whether the 8*l.* 15*s.* has in fact been "paid." The section does not use the word "payable," and it does not refer to the working year, but to the right to work minerals. There may be some difference between the position of a man who lets and a man who works his mines, but the principle is that it is not fair to take taxes from men who are receiving nothing. This Act is not retrospective in the proper sense, but it affects all rents actually "paid" whilst the Act is in operation. These provisions are only machinery and this mode of calculation is only a way of ascertaining the average value. Income tax is a tax on income, and this sum of 8*l.* 15*s.* was deducted from Lord Anglesey's income: *London County Council v. Attorney-General*. (2) Income tax is part of the profits: *Attorney-General v. Ashton Gas Co.* (3)

(1) [1912] 1 Ch. 123.

(2) [1901] A. C. 26, 35.

(3) [1904] 2 Ch. 261; [1906] A. C. 10.

[KENNEDY L.J. referred to *Clennell v. Read*. (1)]
Danckwerts, K.C., in reply on the cross-appeal, referred to
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May 7. The judgment of the COURT (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.) was delivered by BUCKLEY L.J. as follows:—

I take first the question raised by the appeal of the Commissioners of Inland Revenue in Lord Anglesey's case, namely, the question as to the meaning of "rent paid" in s. 20, sub-s. 2 (a), of the Finance (1909-10) Act, 1910.

If there were to be found in the Income Tax Acts any provision rendering the lessor debtor to the Crown, I should be of opinion that the Crown was right. It is because there is no such provision that I think the Crown is wrong.

The question for decision arises thus. Under s. 20, sub-s. 1, of the Finance (1909-10) Act, 1910, mineral rights duty is charged on the rental value, and by s. 20, sub-s. 2 (a), the rental value is to be taken to be the amount of rent paid. If there be a lease at 150*l.* a year and the tenant pays property tax and deducts, as he is entitled to do, the amount from his rent, is the rent paid 150*l.* or is it the differential sum? Quite shortly stated the result of the Act in my opinion is this. There is a contractual obligation to pay 150*l.* a year, but there intervenes a statute which creates in the tenant a Crown debt and provides that he shall be entitled to pay not 150*l.* a year but the difference between the 150*l.* and the amount of that Crown debt. That differential sum is the amount of rent paid.

In the case of mines of coal, included as they are within Sched. A, No. III., r. 2, of the Income Tax Act, 1842, the duty is chargeable on the persons carrying on the concern, and such persons are entitled to make deduction of the duty so charged before making payment to the persons entitled to the profits. In the general case the duty is by virtue of Sched. A, No. IX., r. 1, charged on and to be paid by the occupier, and by Sched. A, No. IV., r. 9, the occupier is entitled to deduct the amount from

(1) (1816) 7 Taunt. 50.

(2) (1873) L. R. 2 H. L. Sc. 273.

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his next payment of rent, and is thereby acquitted and discharged of so much money as if the same had been paid to the person to whom his rent shall have been payable. By Sched. A, No. IX., r. 2, the person having the use of lands, that is to say, in the present case the persons working the colliery, are to be taken and considered for the purposes of the Act as occupiers. The result is that the duty is a Crown debt of the occupier and worker of the colliery, and that he is entitled to deduct from his next payment of rent the amount he pays in respect of that Crown debt and is discharged of the whole rent as if he had (which he has not) paid to his lessor the sum which he has paid to the State in respect of the property tax. The person so paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently. Thus plainly it is not a sum which he can say he paid for or on behalf of his lessor. If he has paid the whole rent without deduction he has paid it voluntarily and cannot recover it: *Denby v. Moore* (1); *Cumming v. Bedborough*. (2) It results that the tenant has not paid a debt of the lessor, he has paid his own Crown debt, and by virtue of the statute he is entitled to deduct the amount of that debt from the contractual rent which otherwise he would have had to pay. It results that the rent paid is the difference.

Attention has been called to several sections of which I will take s. 163 of the Act of 1842 as an example. It speaks of such a person as the lessor as a person charged or chargeable to duty by way of deduction and expresses that he shall in certain cases be entitled to be "repaid the amount of all deductions." It is argued that he cannot be repaid that which he has not paid, and that this shews that the payment by the tenant was a payment on behalf of the lessor. The argument in my judgment is not sound. The person spoken of as chargeable by way of deduction is a person who is not chargeable to the revenue by way of obligation. He is a person who by way of deduction is made to bear the debt, but he never has to pay the debt and the word "repaid" means no more than reimbursed. The word "repaid" cannot here be used in its strict sense, for ex hypothesi it is only by way of deduction that any payment has

(1) 1 B. & Ald. 123.

(2) 15 M. & W. 438.

been made by the person to whom repayment is to be made. To be repaid the amount of a deduction cannot mean to be repaid a sum which has been paid, for the very word "deduction" shews that it has not been paid. The effect of the statute is that the property tax is a portion of the rent (which is profits of the lessor) which is intercepted by the State as its share of those profits with the result that the lessee is by virtue of the statute in a position to discharge himself of the whole of his debt of 150*l.* to his lessor by payment of only, say, 140*l.* In case the lessor be a person who is exempt from income tax or entitled to abatement of income tax, the sums of which he obtains payment under the Act of Parliament are recovered as a statutory debt owing to him by the Crown. The rent paid by the lessee remains the less sum which he has paid to the lessor, but under the Act of Parliament the latter is entitled to have in addition to his rent a satisfaction of the statutory liability of the Crown to pay him that by which notwithstanding that he was exempt his rent was in fact reduced. It results that in my judgment the rent paid in this case is not the contractual rent, but the difference between the contractual rent or so much of it as the tenant affects to pay and the property tax which the tenant has deducted.

It follows that the appeal of the Crown in Lord Anglesey's case must be dismissed.

I take secondly the question whether the super-tax is to be deducted in order to arrive at the sum chargeable under s. 20. Super-tax is an additional income tax chargeable under s. 66 of the Finance (1909-10) Act, 1910. It is payable not by the tenant but by the recipient of the income. The amount upon which super-tax is to be charged is to be determined by ascertaining what is the income of the lessor from all sources. His income from this source, namely, the mineral rights, is (upon the footing of that which has preceded) not the total amount of the rent, but the difference between the contractual rent and the property tax in respect of the rent. In the case with which we have to do, that amount is 356*l.* 5*s.* That sum with other income of the lessor will be aggregated, and upon the excess of the aggregate over 3000*l.* the additional duty of

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super-tax is charged. There is no ground in this case for making any deduction from the 356*l.* 5*s.* of the amount of the super-tax.

Lastly I take the question of the arrears, meaning the amount of rent falling due within a working year which expired before the Finance (1909-10) Act, 1910, came into force, but which in fact was paid in a working year after the Act came into force. Before dealing with this case I will assume a case in which the lease was granted after the Act came into force and in which the tenant in the first working year paid only half his rent. The rental value for the relevant financial year would then be the amount (being one half) of the rent paid in the first working year. Suppose that then the tenant in the second working year pays the half-year's arrear for the previous year and the whole of the amount for the current year. Upon the words of s. 20, sub-s. 2 (a), it seems to me beyond dispute that the rental value chargeable in the second financial year will be the rent and a half paid by the lessee in the second working year. In other words all rent paid will from time to time become assessable to duty whether it be for current rent or for arrears of rent, but duty does not become payable before the rent is in fact paid. If this be true as regards arrears after the commencement of the Act there is in the statute no variation of language addressed to the case of arrears in respect of working years before the commencement of the Act. So that upon the literal construction of the statute it seems to me to follow that arrears before the commencement of the Act become chargeable to duty. The argument to the contrary is put as I understand it in this way. The statute must be contemplated as charging not the mineral rights which the lessor had before the Act and which have been worked out, but such mineral rights as he had when the Act came into force; the arrears of rent due before the Act represent the purchase price of minerals worked before the Act, and to these the statute cannot be contemplated as extending. The fact is, however, that at the commencement of the Act the lessor enjoyed a book debt or right to payment of a sum of money and also enjoyed certain minerals which were in the soil and which would thereafter produce rent. There is no reason why the statute should not, if its language be apt for the purpose, charge

as well the former as the latter of these. It is argued that if the lessor had got in his rents before the commencement of the Act he would have escaped the duty on them, and that he ought not to be taxed because he was lenient to his tenant and did not enforce payment when the rent fell due. Considerations of this sort do not seem to me admissible. These arrears of rent were in fact paid at a date when under s. 20, sub-s. 2 (a), they were to be taken into account in ascertaining the rental value. Upon these grounds therefore I arrive at the conclusion that the contention of the Crown as to the arrears is right.

It was further argued that the result of this view is that the working owner dealt with by s. 20, sub-s. 2 (b), is in a better position than the demising owner under s. 20, sub-s. 2 (a), for that the former can never have any arrears of rent due from himself, and that he is simply chargeable upon the rental value as from the commencement of the Act. This is true, but furnishes no ground, I think, for construing s. 20, sub-s. 2 (a), otherwise than according to the plain meaning of the words. Sub-s. 2 (b) uses the word "received," and this lends some additional force to the argument as to the words "rent paid" in sub-s. 2 (a) as shewing that that which measures the rental value is the sum which in the working year is received by the owner of the mining rights. The language of the statute is I think such as to bring in for the purpose of calculating rental value the rent paid by the lessee whether due for a period before or after the commencement of the Act.

The result I think is that the cross-appeal in the Duke of Beaufort's case fails and must be dismissed.

Solicitors : *Solicitor of Inland Revenue ; Williams & James.*

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Revenue—Reversion Duty—Surrender of Lease—Grant of New Lease—Benefit accruing to Lessor—Deduction—Compensation payable by Lessor at Determination of Lease—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13, sub-s. 2—Revenue Act, 1911 (1 Geo. 5, c. 2), s. 3, sub-s. 2.

In ascertaining the value of the benefit accruing to a lessor, by reason of the determination of a lease, for the purpose of the reversion duty payable under s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, there is, by sub-s. 2, to be deducted "all compensation payable by such lessor at the determination of the lease."

Two leases, which would have expired respectively in 1968 and 1966, were surrendered by the lessee to the lessor on December 19, 1910, on which date the lessor granted to the lessee a new lease of the hereditaments comprised in the two leases at the same rent for a term expiring in 1979. The new lease was expressed to be made in consideration of the surrender of the two leases. If there had been a surrender of the two leases and no new lease had been granted, the value of the benefits thereby accruing to the lessor would have been, respectively, 395*l.* and 1340*l.* The Commissioners claimed reversion duty on those two sums:—

Held, that the grant of the new lease was not compensation payable by the lessor at the determination of the two leases within the meaning of s. 13, sub-s. 2, and that reversion duty was payable on the sums claimed.

Decision of Horridge J. [1913] 1 K. B. 356, reversed.

By a lease dated June 22, 1869, the hereditaments No. 89, High Street, Burton-on-Trent, were demised for a term of ninety-nine years from April 5, 1869, at a yearly rent of 15*l.*; and by a lease dated July 31, 1868, the hereditaments Nos. 91 and 92, High Street, Burton-on-Trent, were demised for a term of ninety-nine years from October 10, 1867, at a yearly rent of 10*l.* On December 19, 1910, these two leases were surrendered by one James Campbell, in whom they were then vested, to the respondent, the person then entitled to the freehold reversion expectant on the determination of the leases.

Upon the surrender of the leases the respondent by a lease dated December 19, 1910, demised Nos. 89, 91, and 92, High

Street, Burton-on-Trent, and two other hereditaments to the said James Campbell for a term of sixty-nine years from April 5, 1910, at a yearly rent of 40*l.* The new lease was expressed to be made in consideration of the surrender of the two leases and of the rent and the lessee's covenants reserved by and contained in the new lease. It did not contain any apportionment of rent as between the various hereditaments thereby demised, but the yearly rent of 40*l.* was in fact made up as follows: 15*l.* in respect of No. 89, High Street, 10*l.* in respect of Nos. 91 and 92, High Street, 10*l.* and 5*l.* in respect of the other two hereditaments respectively.

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On May 31, 1911, the Commissioners of Inland Revenue gave notice in writing to the respondent that they had made under s. 13 of the Finance (1909-10) Act, 1910, assessments to rever- sion duty upon him amounting respectively to 4*l.* 17*s.* 1*d.* and to 15*l.* in respect of the benefit accruing to him by reason of the determination on December 19, 1910, of the lease of June 22, 1869, of No. 89, High Street, and of the lease of July 31, 1868, of Nos. 91 and 92, High Street.

The assessment in respect of 89, High Street was arrived at by the Commissioners in the following manner:—The Commis- sioners ascertained the total value (as defined for the purpose of the general provisions of Part I. of the Finance (1909-10) Act, 1910) as on December 19, 1910, of the hereditaments No. 89, High Street, Burton-on-Trent, at 840*l.*, and the total value of the said hereditaments as at the time of the grant of the lease of June 22, 1869 (on the basis of the rent reserved and payments made in consideration of the said lease), at 375*l.* They determined that no part of the total value of 840*l.* was attributable to any works executed, or expenditure of a capital nature incurred, by the lessor during the term of the said lease, and that no compensation was payable by the lessor at the determination of the lease. They accordingly ascertained the value of the benefit accruing to the lessor by reason of the determination of the said lease at 465*l.*, being the amount by which the sum of 840*l.* exceeded the sum of 375*l.* Duty at the rate of 1*l.* for every complete 10*l.* of the said sum of 465*l.* amounted to 46*l.*, which being discounted as provided for by s. 3,

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On June 27, 1911, the respondent notified his intention of appealing to a referee against both assessments on the grounds (inter alia) that the total value of the premises 89, High Street, Burton-on-Trent, at the determination of the lease was not 840*l.* and that the correct amount of duty was not 4*l.* 17*s.* 1*d.*; that no benefit in fact accrued to the lessor by reason of the determination of the leases; and that no deduction had been allowed under s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, or otherwise, in respect of the value of the new lease granted to the lessee, which was in effect compensation to the lessee for the determination of the old ones.

The appeal was heard by Mr. Daniel Watney, the referee duly authorized in that behalf, who gave the following decision in respect of each assessment:—"That no benefit has accrued to the lessor by reason of the termination of the lease, and that the grant of the new lease must be taken as compensation payable by the lessor."

At the hearing before the referee it was either proved or agreed that the total value as on December 19, 1910, of the hereditaments 89, High Street was 770*l.* and not 840*l.* (which made the value of the alleged benefit accruing to the lessor 395*l.* instead of 465*l.*); that no part of the total value as on December 19, 1910, of either of the hereditaments was attributable to works executed or expenditure of a capital nature incurred by the lessor during the terms of the leases of June 22, 1869, and July 31, 1868; and that, unless the grant of the new lease was to be taken as compensation payable by the lessor at the determination of the two old leases, no such compensation was in fact so payable.

The Commissioners of Inland Revenue appealed against the

decision of the referee, and Horridge J. affirmed the decision of the referee. (1)

The Commissioners appealed. The case depended on the construction of s. 13 of the Finance (1909-10) Act, 1910. (2)

Sir John Simon, S.-G., and T. J. C. Tomlin, for the appellants. The value of the benefit accruing to the lessor upon the determination of a lease is fixed by s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910. It is the difference between the total value of the land at the determination of the lease and its value at the date of the original grant of the lease; the method of ascertaining both values is fixed by the Act. What the lessor may pay to the lessee to induce him to surrender the lease, or on what terms he may grant a new lease, have nothing to do with it. The only deductions allowed from the value of the benefit as ascertained by the Act are such part of the value as is attributable to capital expenditure by the lessor and compensation payable by the lessor at the determination of the lease. The referee found, and it is not disputed, that there is no part of the value attributable to capital expenditure. But he and

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(1) [1913] 1 K. B. 356.

(2) Finance (1909-10) Act, 1910
(10 Edw. 7, c. 8), s. 13:

“(1.) On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value.

“(2.) For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is

attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property), but, where the lessor is himself entitled only to a leasehold interest, the value of the benefit as so ascertained shall be reduced in proportion to the amount by which the value of his interest is less than the value of the fee simple.”

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Horridge J. considered that the grant of the new lease is compensation payable by the lessor at the determination of the lease; and as there is no increase of rent the compensation to be deducted cancels the increase in the value of the land and no reversion duty is payable. The compensation intended must be something payable under a contract contained in the lease; the new lease cannot be compensation, it is the price paid for surrender. The allowance given by the repealed sub-section, s. 14, sub-s. 3, in case of the determination of a lease before its expiration is inconsistent with the respondent's contention, and that sub-section, though repealed, may be looked at on a question of construction.

[COZENS-HARDY M.R. The repeal is in a very strong form, "the sub-section shall cease to have effect and be deemed never to have had effect." I do not think we can look at it.]

Sect. 3, sub-ss. 2, 3, and 4, of the Revenue Act, 1911, are inconsistent with the decision appealed from. Sub-ss. 2 and 3 provide that if a lease is determined before its natural expiration the duty to be paid is not the full duty, but such a sum as would with compound interest at 4 per cent. produce the full amount at the expiration of the lease. If in addition to that the lessor is to be allowed as compensation the value of any new lease he would be compensated twice over. Sub-s. 4 provides for exemption, in case of a lease held in trust for any body of persons being determined by surrender, in order that separate leases of various plots of the land may be granted to individual members of the body. But if, as is contended here, no duty is payable where the leases are consolidated, none would be payable on the separation into several leases, and the sub-section would be unnecessary.

Danckwerts, K.C., and *Micklethwait*, for the respondent. It is a mere accident that in this case the compensation payable is the full value of the reversion which falls in. The whole idea of the Act is that the land has increased in value and that the landlord comes into possession of that increased value which is a fair subject-matter for taxation. The subject-matter of the taxation must not be confounded with the prescribed method of estimating its value. Sect. 13, sub-s. 1, of the Act of 1910 clearly defines

the subject-matter of the taxation. It is "the benefit accruing to the lessor by reason of the determination of the lease." If there is no benefit there can be no tax. Sect. 15, sub-s. 1, makes that still more clear, for that section makes the tax recoverable only "from any lessor to whom any benefit accrues." Then s. 13, sub-s. 2, deals with the means for ascertaining the value of the benefit accruing, but it cannot be construed as imposing a tax where there is no benefit. The section allows a deduction for any compensation payable by the lessor at the determination of the lease. It must be remembered that all agricultural land is exempted from reversion duty; the compensation therefore cannot refer to any compensation payable by custom, or under any Act of Parliament, for no such custom or Act of Parliament applies to leases of buildings or building land. It must be something which is payable by contract, and there is no reason for confining it to a contract contained in the lease. Compensation must include everything which under any contract the lessor has to pay to the lessee in order to get possession or surrender of the lease. It makes no difference whether the compensation is payable for part of the premises comprised in the lease or the whole. The referee and Horridge J. were right in holding that the grant of the new lease was compensation.

Sect. 3, sub-s. 2, of the Revenue Act, 1911, has nothing to do with the granting of a new lease in consideration of the surrender of an old one. It only applies where the lease is determined by the vesting of the interests of the lessor and lessee in the same person.

COZENS-HARDY M.R. This is an appeal from the decision of Horridge J., who has held that in the circumstances which I can explain in a very few words reversion duty is not payable by Lord Anglesey. Lord Anglesey is the owner of a very large property at Burton-on-Trent, and amongst his property there were three houses represented by two leases, one dated in 1869 and the other in 1868, for a term of ninety-nine years. The rent reserved in the one lease was 15*l.*, and the rent reserved in the other lease 10*l.* Those leases, of course, had a very long period to run; they did not expire in the one case until April, 1968, and

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Mr. Danckwerts has argued, and if there was nothing else in the Act I think there would be very great force in his argument, that it is very difficult to say that there was really any benefit to the lessor from this transaction. He did not get one penny more rent, he did not get possession a day sooner, and in fact he was kept out of possession for some years longer at the end of the lease. I need not say that it is not my right, and certainly it is not my desire, to consider the policy of this Act, whether it works out fairly or not; my only duty is to interpret as far as I can the language used by Parliament in this section.

The charging section, which is sub-s. 1 of s. 13, says the duty is on the value of the benefit accruing to the lessor by reason of the determination of the lease; but sub-s. 2 goes on to define

that value, not merely to say, as is sometimes done, that it "shall include so and so," but "for the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount"; then you have to work out a subtraction sum, and a very curious subtraction sum. It is not very easy to understand the real basis upon which it is arrived at, but there it is, and my only duty is to give effect to it. It says that one item of the calculation is to ascertain the total value as defined for the purposes of the general provisions of this part of the Act relating to valuation of the land at the time the lease determines. Then there are some words which I will come back to in a minute. That is on one side of the account; the value of the benefit accruing is to be deemed to be the amount, if any, by which the total value exceeds the total value of the land at the time of the original grant of the lease. That is not to be ascertained on the principle of the total value found in s. 25, but on the basis of the rent reserved and payment made in consideration of the lease at the time when the lease was originally granted. What is the major thing, that is to say, the total value at the date of the expiration of the lease? That is defined by s. 25, sub-s. 3: "The total value of the land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land," and so on. None of those deductions have any application to the present case, and you are taken back to the definition of gross value in the same section, and that means "the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise." That is to say, for the present purpose there is no difference between the gross value and the total value. The gross figures have been given to us; they appear on the statement of the case. The present total value as to one property is 770*l.*, and the other

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1590*l.*, and the old total value taking it upon the rental basis is in one case 375*l.* and the other 250*l.*, in each case, of course, shewing a very considerable difference. All therefore I have to do is to see whether in that part of sub-s. 2 of s. 13 which I have not yet read there is anything which entitles Lord Anglesey to say there is a further sum which you ought to subtract in order to find the sum on which 10 per cent. duty is payable. The words which I omitted are "subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease"—those words have no application to the present case at all—"and of all compensation payable by such lessor at the determination of the lease." It is said that the grant of the new lease in consideration of the surrender of the two leases is "compensation payable by the lessor at the determination of the lease." I am entirely unable to accept that view. I do not think in any point of view the grant could be considered compensation payable by the lessor, but I do not think, even if that difficulty were got over, that the words "compensation payable by the lessor" have any reference whatever to that which is really purchase-money for the lease which is acquired by the lessor in order that he may get possession of the property and grant a new lease of the property which he does acquire. "Compensation payable by the lessor at the determination of the lease" seems to me to mean, and only to mean, a sum which is payable at the end of the lease either by virtue of a covenant in the original lease, or, which is quite possible and quite usual, by virtue of some contract during the currency of the lease, by which the landlord says "if you like to erect these buildings I will pay the then value of them at the end of the lease." That is the sort of thing which those words mean and the only thing which they mean. I entirely decline to attribute to the words "compensation payable by the lessor" the meaning of "purchase price or consideration given either in cash or by means of a new lease for a surrender by the lessee of his property," or that which leads to the lessor acquiring the property of the lessee. Mr. Danckwerts says if the landlord is bound by covenant or by subsequent contract to pay a sum of money in respect of buildings

left upon the premises, that is really a purchase of part of the demised premises. With great respect to Mr. Danckwerts, it is nothing of the kind; it is merely a sum which is payable under a contract either in the original lease or made subsequently. It is a matter that does not affect the demised premises, it is not a purchase of the demised premises or any part of them.

Our attention has been called to various sections of this Act and of the amending Act of 1911 as throwing light upon the question before us. Speaking for myself, I do not think it necessary to go into those sections. They certainly do not assist Mr. Danckwerts. I doubt whether sub-s. 3 of s. 14, which has been now repealed, ought to be referred to at all, and the other sections really do not to my mind throw any great light on the matter. I think that the view taken by the Crown is right here and that reversion duty under the express language of this Act is payable, but not payable in full at this time, because the lease is determined in 1910 instead of 1968 or whatever the year was; but that is really met by sub-s. 2 of s. 3 of the Act of 1911. I cannot agree with Mr. Danckwerts' argument that sub-s. 2 has no application to a case like the present. This surrender is a transaction by which the lease of the land determines on the vesting of the lessor's interest and the lessee's interest in the same person, that is to say, in the lessor. I think, therefore, that the duty must be calculated upon the difference as stated in the case, having regard, however, to the provisions of s. 3, sub-s. 2, of the Act of 1911, under which the amount of duty which would otherwise be payable in 1968 is to be discounted in the manner mentioned.

For these considerations, with great respect to Horridge J., who took a different view, I think that this appeal must be allowed.

BUCKLEY L.J. The referee expresses his conclusion in these words: "No benefit has accrued to the lessor by reason of the determination of the lease, and the grant of the new lease must be taken as compensation payable by the lessor." If those were to be understood as two separate statements of conclusions of

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fact at which he had arrived, it would seem to me that the second of them would be irrelevant after the finding of the first; but we are told, and every one is agreed, that they must not be read as two separate statements of fact, but the latter must be read as the reason for the former, and we must take it to mean that no benefit has accrued to the lessor by reason of the determination of the lease, inasmuch as the grant of the new lease must be taken as compensation payable by the lessor. The question is whether the grant of the new lease in December, 1910, which was value, is "compensation" within the meaning of the words in s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, "compensation payable by such lessor at the determination of the lease." It has been argued, and I quite accede to the argument, that one ought to read this Act of Parliament and to endeavour to arrive at its meaning upon a reasonable review of that for which it was intended to provide. What was pointed at here was this, that when a lease had been current and during the currency of the lease the value of the land had appreciated from causes not due to anything further put into the land by either the lessor or the lessee, you were to find the difference between the value at the end of the term and the value at the beginning of the term, and there was a certain duty to be charged upon the difference. That is expressed in this section by saying that the value at the end of the term is first to be taken subject to certain deductions, and one of those deductions is to be compensation payable by the lessor at the determination of the lease. The former of them is "works executed or expenditure of a capital nature incurred by the lessor during the term of the lease." So that the first is further money put by the lessor into the demised premises during the currency of the lease, and the latter is compensation which he has to pay at the determination of the lease. Having got the total value of the land at the end of the term with these deductions you have to find what the value was at the beginning of the term, and upon the difference between the two a certain sum is to be charged. The question is whether value paid for the surrender of the lease is compensation within those words. For facility merely I will assume that the grant of the new lease was worth

in money 500*l*. Suppose the lessor paid 500*l*., would the payment of that 500*l*. have been compensation within this section? In my opinion it would not. Let me take these two cases: first the case where the tenant's estate comes to an end but he has done something upon the land in respect of which he is entitled to compensation. That is to be deducted for the purpose of the section. Then take the other case, in which the tenant's estate has not come to an end, but the lessor pays him what I have called 500*l*. for a surrender of his remaining estate in the land. In that case the lessee having an estate in the land for (say) ten years or twenty years, or whatever it is, the lessor is willing to pay him 500*l*. to be put into present possession of that of which he would not otherwise have had possession for another ten years or twenty years; he is purchasing the tenant's estate in the land. Within no reasonable meaning of the words is that compensation payable by the lessor at the determination of the lease; it is purchase-money paid by the lessor for the purchase of the tenant's estate in the land comprised in the lease.

Let me put this in figures in order to shew how upon that view it appears to me to work out perfectly correctly. The figures here are these: the values at the determination of the term are 2360*l*.; the values at the date of the original lease were 625*l*., and the difference between them is 1735*l*. Making the hypothesis that the value of the property will be the same at the end of the term as it is now, I must take it that the lessor is seeking to be put into possession now of an increased value of 1735*l*.; the present value of that 1735*l*. might be, say, 1000*l*.; so he says to the tenant: I will pay you, say, 735*l*. to put me into present possession of an increased value of 1735*l*. That is an arithmetical sum which answers itself; he has then paid 735*l*. for value which he then receives, namely, the present possession of a sum of 1735*l*. which otherwise would have been a reversionary sum for the next such number of years as the lease extends. That is purchase-money for something which having purchased he takes and enjoys, and is not a sum to be brought into computation for the purpose of ascertaining what is the unearned increment accruing to the land during the currency of the lease. That

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C. A. increment is to be arrived at by ascertaining a differential sum
1913 between the value at the end of the term and the value at the
INLAND beginning of the term. It all comes back to this, that a sum
REVENUE paid by a lessor for the purchase of the tenant's unexpired
COMMISSIONERS interest in the land is not compensation payable by the lessor
F. at the determination of the lease. For these reasons I think
(MARQUESS). that this appeal succeeds.

KENNEDY L.J. I am of the same opinion, and after what has been said, with most of which I entirely agree, I will say very little. What we have to say is whether or not the words of s. 13, sub-s. 2, "compensation payable by such lessor at the determination of the lease," are to be treated as covering a grant, you may call it if you like, which has been made for the remainder of the term upon the surrender of an existing lease. It is really, as has just been said, a case in which logically those who support the judgment of Horridge J. must assert that under the term "compensation payable by such lessor" would be included the purchase-money for the surrender of the existing lease. To my mind that is impossible. I am not intending to say, because as at present advised I do not think it is correct, that one ought to assume that that which the Legislature meant to get at in charging reversion duty was unearned increment; in my view from whatever causes (except the particular ones which are mentioned in the section, namely, by certain expenditure upon the land which is specially dealt with, or covenants, or undertakings) the value of the land has been enhanced at the date of the determination of the lease, upon that you have got to base the one factor of the sum to be arrived at upon which the reversion duty is payable, the other factor being the total value of the land at the time of the original grant of the lease, which is to be ascertained on the basis of the rent reserved. In the present case, for the reasons given by the Solicitor-General, it would really be not merely, in my view, outside any reasonable meaning of "compensation payable by such lessor," but altogether unsound as a matter of reason and of calculation such as would be just, if you brought in as compensation that, either purchase-money or the equivalent of purchase-money, which has

been presumably a sum of money paid or an arrangement such as the renewal of a lease to which the lessor has agreed, in order to get the advantage which the bargain gave him. That advantage no doubt may have to be the subject of some such calculation as is given in s. 3, sub-s. 2, of the Act of 1911, to which the Master of the Rolls has referred; there may have to be a calculation by which some allowance has to be made in accordance with that sub-section; but the real question that one has to decide after all is whether you are entitled to include under the words "compensation payable by such lessor," or as coming fairly under that head, that which either in money or in money's worth has been given by the lessor to gain the advantage of possession. I think not.

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Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Williams & James.*

J. R. B.

[IN THE COURT OF APPEAL.]

CARLISLE AND SILLOTH GOLF CLUB v. SMITH.

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 April 23, 24;
May 2.

Revenue—Income Tax—Golf Club—Fees received from Visitors—Profit or Gain—Method of Assessment—Income Tax Act, 1842 (5 & 6 Vict. c. 35), Sched. D, Cases 1 and 6.

The appellants, an ordinary members' golf club, acquired land under a lease from a railway company and laid out a golf course and erected a club-house thereon. In addition to the members of the club, who were entitled on payment of an annual subscription to play on the links and to other privileges for the current year, a considerable number of visitors were permitted to use the club premises and to play on the links in accordance with a provision contained in the lease which required the club to allow such visitors to play on payment of certain green fees. The total annual expenditure incurred by the club in maintaining the links in a proper condition for play exceeded the total amount of fees received from visitors:—

Held by the Court of Appeal, affirming the decision of Hamilton J., that the appellants were carrying on an enterprise which was beyond the scope of the ordinary functions of the club, and as to which separate accounts might be kept so as to ascertain whether there were any profits,

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and that any profits derived from the visitors' green fees were therefore taxable under Sched. D of the Income Tax Act, 1842.

The Commissioners for the General Purposes of the Income Tax had decided that the club was liable to assessment in respect of visitors' green fees, less such proportion of the annual outlay in maintaining and keeping up the links and club-house as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance and upkeep. Hamilton J. held that the method of arriving at the amount of the taxable profits adopted by the Commissioners was wrong, and that in default of agreement the case must go back to them to ascertain the amount of taxable income received by the club:—

Held, that this decision was right.

Decision of Hamilton J. [1912] 2 K. B. 177, affirmed.

APPEAL from a decision of Hamilton J. (1)

The question raised upon the appeal was whether the appellants, the Carlisle and Silloth Golf Club, were liable to assessment for income tax under Sched. D of the Income Tax Act, 1842, in respect of fees received by them from visitors for the privilege of playing upon the appellants' links and using their club-house.

The question was originally raised upon a case stated under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Allerdale below Derwent in the county of Cumberland. The case is set out in the report in the Court below. (1) Shortly stated the facts were as follows:—

The club was an ordinary bona fide members' golf club formed for the provision and maintenance of golf links at Silloth together with a club-house and other usual conveniences in connection therewith. The land upon which the links were formed and the club-house erected was held by the club under a lease from the North British Railway Company. The lease provided inter alia that the lessees should allow non-members to play golf on the links on payment of certain fees to be fixed from time to time by the lessors. A considerable number of visitors used the club-house and played on the links on payment of the prescribed green fees as provided by the lease.

The total amount received from visitors' fees for the year 1905 was 177*l.* 4*s.*; 1906, 192*l.* 13*s.* 6*d.*; 1907, 204*l.* 11*s.*; and 1908, 228*l.* 19*s.* 6*d.* The necessary expenses incurred in each year in

(1) [1912] 2 K. B. 177.

maintaining the club exceeded the amounts received in green fees from visitors. The expenditure upon the golf course alone (as distinct from the club-house and premises) was for the year 1905, 256*l.* 2*s.* 7*d.*; 1906, 270*l.* 2*s.* 3*d.*; 1907, 269*l.* 15*s.* 3*d.*; and 1908, 301*l.* 8*s.* 6*d.*

Assessments of 66*l.* were made upon the club under Sched. D of the Income Tax Act, 1842, for each of the two years ending April 5, 1909, and April 5, 1910, respectively in respect of profits from visitors based on the appellants' accounts. Upon an appeal from these assessments the Commissioners decided that the club was liable to assessment in respect of visitors' green fees less such portion of the annual outlay in maintaining and keeping up the links and club-house as the visitors' contributions bore to the entire annual income of the club or fund available for the maintenance and upkeep. An appeal from this decision was dismissed by Hamilton J., who held that the club was carrying on an enterprise beyond the scope of the ordinary functions of the club, and as to which it was possible to keep separate accounts so as to ascertain whether there were any profits, and that any profits derived from the visitors' green fees were taxable under case 1 or case 6 of Sched. D of the Income Tax Act, 1842. He held, further, that the method of arriving at the amount of the taxable profits adopted by the Commissioners was erroneous, and that the case must go back to them to ascertain the amount of taxable income received by the club. Against this decision the club appealed.

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Ryde, K.C., and *A. M. Latter*, for the appellants. First this club is not an association which is liable to assessment to income tax at all. It is not an undertaking carried on for the purpose of profit or gain.

Secondly, it is not shewn upon the case that there are any profits which are taxable. A club of this kind is not an entity in law, but only an association of the members who cannot make a profit out of themselves. Sect. 40 alone provides for the assessment of such an institution. The club is not engaged in any "adventure or concern in the nature of trade" within the meaning of the first case in Sched. D of the Income Tax Act,

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1842, nor does the club make any annual profits or gains within the meaning of the sixth case of the same schedule. As to the nature of a members' club, see *In re St. James's Club* (1) and *Wise v. Perpetual Trustee Co.* (2) Apart from these visitors it could not be said that the mere fact of there being a surplus on the working of the club shewed there were taxable profits. The decision in *New York Life Insurance Co. v. Styles* (3) does not apply to the present case. That was a case of mutual insurance and business done with strangers was quite separate. Here no profit can be shewn on the business done with non-members, unless the business of the members is brought into account. The club do not either collectively or individually make any profit, because the expenses of maintenance and upkeep of the course exceed the amount received from the visitors. If an account be taken, and on one side of it is put the expense of upkeep, and on the other the visitors' fees, there would be a deficit, and the only way to balance the account would be to include the value to the members of the right to play golf on the course. That is not taxable.

What is taxable is something which is money or can readily be turned into money: *Tennant v. Smith*. (4)

[BUCKLEY L.J. Suppose a householder takes a paying guest?]

The question is whether there can be a severance of this part of the club's enterprise from the remainder: *Grove v. Young Men's Christian Association* (5), where *Religious Tract and Book Society of Scotland v. Forbes* (6) was followed. Hamilton J. wrongly thought that there could be a severance. That could only be made by bringing in the value to the members of the right to play golf. Moreover upon the facts of the case there are no profits from the visitors. The assessment should be discharged without sending back the case to the Commissioners.

Sir Rufus Isaacs, A.-G., and *W. Finlay*, for the respondent. It is said that it is impossible for this club to make a gain or profit from the receipt of visitors' fees. Having regard to the terms of the lease the club, in consideration of allowing visitors

(1) (1852) 2 D. M. & G. 383.

(2) [1903] A. C. 139.

(3) (1889) 14 App. Cas. 381.

(4) [1892] A. C. 150, 156.

(5) (1903) 4 Tax Cases, 613.

(6) (1896) 3 Tax Cases, 415.

to play on the links, are receiving money, and assuming that there is a surplus of receipts over expenses, that is a taxable profit. The application of the money so received is irrelevant.

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Tennant v. Smith (1) was a different case, for there no money was paid. Here the question is whether the club as an association has received money from non-members and given something for it, and whether there is a profit on the transaction. Suppose a club having premises on the route of a procession lets seats to non-members for the purpose of viewing the procession, the money so received would be taxable. Or again, gate money received by a county cricket club and used for the upkeep of the club would equally be taxable. The sixth case of Sched. D is very wide and sweeps in everything not in the nature of trade or business—the words are “any annual profits or gains not falling under any of the foregoing rules.” Other cases might be cited, but authorities are not of much assistance upon the point: *Dillon v. Corporation of Haverfordwest* (2); *New York Life Insurance Co. v. Styles* (3); *In re Glasgow Corporation Water-works* (4); *Glasgow Corporation Water Commissioners v. Miller* (5); *In re Surrey County Cricket Club*. (6)

[KENNEDY L.J. referred to [1901] 2 K. B. p. 409.]

Ryde, K.C., in reply. This club is an association of gentlemen who by receiving fees from visitors reduce the expense to themselves of playing golf. That does not raise a case for taxation under the Income Tax Acts. A reduction of expenses does not constitute income.

Cur. adv. vult.

May 2. COZENS-HARDY M.R. The appellants are an unincorporated association of ladies and gentlemen for the provision and maintenance of golf links, with a club-house and other conveniences. The members pay subscriptions and are entitled to play on the links. There is no question of the division of profits. The club was not formed for that purpose. In so far as subscriptions received from members are concerned, it is conceded that

(1) [1892] A. C. 150, 156.

(2) [1891] 1 Q. B. 575.

(3) 14 App. Cas. 381.

(4) (1875) 1 Tax Cases, 28.

(5) (1886) 2 Tax Cases, 131.

(6) [1901] 2 K. B. 400.

C. A. the club are not assessable to income tax. But in addition to
 1913 members, there are a considerable number of visitors who play
 on the links and use the club-house on payment of certain
 "green fees." As between the club and their lessors, the club
 are bound to admit visitors. The annual sum received for
 "green fees" from visitors is from 200*l.* to 300*l.* The cost of
 maintaining the golf course exceeds this amount; and it also
 exceeds the annual sum received from members for subscriptions.
 If there were no fees from visitors the subscriptions of members
 would have to be increased.

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In these circumstances it is contended, and Hamilton J. has decided, that, in so far as the club invite and receive "green fees" from visitors, the club are liable to be assessed in respect of the annual "profits or gains" within case 1 or case 6. It is urged that this is something severable from the ordinary and proper business of a golf club. On the other hand, it is contended that no such severance is possible, and, further, that there can be no profits or gains, for the total cost of maintaining the golf course exceeds the amount of the visitors' fees.

It seems to me that there is a real difference between moneys received from members and applied for the benefit of members and moneys received by the club from strangers. I cannot draw any distinction between gate moneys, which might be, and I believe sometimes are, received by a golf club, and green moneys. In each case the club would be assessable. Whether there have been any profits or gains is a matter of fact; and the answer will depend upon the mode in which the expenses of maintenance and other outgoings ought to be attributed to the visitors. This is really a question of fact for the Commissioners, and not for this Court. Hamilton J. held, and I agree, that the particular rule adopted by the Commissioners was wrong, and he referred it back to the Commissioners, in default of agreement, to ascertain the profits. In my opinion his decision was right, for the reasons assigned by him. The appeal must be dismissed with costs.

BUCKLEY L.J. I agree as well in the reasoning as in the conclusions of the judgment pronounced by Hamilton J. His decision, was, I think, quite right. I should think it unnecessary

to add anything, but out of respect to some of the arguments urged before us I will add the following. If it were necessary (which it is not) to decide whether the club were carrying on "an adventure or concern in the nature of trade," I am of opinion that they were. To determine this question it is not the character of the person who carries on but the character of the concern which is carried on that has to be regarded. If a land-owner laid down upon his land a golf course and charged fees for admission and user—if, that is to say, the links were a proprietary golf links carried on with a view to profit—there can be no question but that the proprietor would be assessable. The adventure of maintaining golf links and charging for the use of them is an "adventure or concern in the nature of trade." If other conditions therefore are satisfied the club are, I think, assessable under the first rule of Sched. D. But as I have already said, it is, I think, unnecessary to determine whether that is so or not, for if it were not a "concern in the nature of trade," yet, other things being satisfied, the club would be assessable under the sixth rule.

Further, the question is not whether the members of the club are making profit but whether the fraternity or society chargeable under s. 40 of the Act of 1842 are making profit by the concern in question. The appellants laid great stress upon the fact that the expenses in each year exceed the amount received from green fees from visitors. That fact seems to me irrelevant upon the question whether the club are assessable. If relevant at all it is upon the question whether upon the balance of profits and gains there is anything upon which an assessment can be made. The club, that is to say an association of persons paying subscriptions, invites or is by contract with the railway company obliged to admit third parties to play upon the links upon the terms of paying certain sums. The association receives these moneys. A person, said Lord Macnaghten in *Tennant v. Smith* (1), is chargeable for income tax not on what saves his pocket but on what goes into his pocket. These words are satisfied. The association puts into its pocket the sums received from visitors. The result no doubt is to save the pocket of the subscribing

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(1) [1892] A. C. 164.

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members, but that is not the question. The club is here putting into its pocket money received not from its members but from outsiders. A man cannot make a profit or a loss out of himself, and that was the ground of decision in *New York Life Insurance Co. v. Styles*. (1) The present case resembles not that case but *Last v. London Assurance Corporation*. (2) We have not to decide what sum, if any, by way of expenditure ought to be debited against the receipts from visitors in ascertaining the balance of profits or gains. For the determination of this case it is only necessary to say that the club as an association (like the proprietary owner of a golf links) is receiving payments from third parties and that the balance of profits or gains after debiting against those receipts such sum as may be proper by way of expenditure is a profit going into the pocket of the club in respect of which it is assessable. The fact that in the pocket of the club it saves the pocket of the members by reducing in their favour the current expenditure which otherwise they would have to bear is not a material circumstance for the purpose of ascertaining whether the club as a society has made a profit or not. The appeal, I think, fails and should be dismissed with costs.

KENNEDY L.J. In my opinion the judgment of the Court below was right, and this appeal should be dismissed.

The Carlisle and Silloth Golf Club is not in a position to assert that its receipts from visitors, not being members of the club, cannot constitute annual "profits and gains" in respect of which income tax is assessable. It has entered into an agreement with the North British Railway Company, the lessor of the club ground, under which the club is bound to allow visitors, who are not members of the club, to use the club-house and play on the club's links, upon payment of fees, for the day or the week or the month, as the case may be, on a scale which, subject to a minimum, may be fixed from time to time by the lessors. The club retains no right of discrimination; the use of its club-house and ground is open to any one who presents himself and is willing to pay the prescribed fee. It is not, therefore, the common case of a golf club which admits to the use of its

(1) 14 App. Cas. 381.

(2) (1885) 10 App. Cas. 438.

accommodation players who are introduced by a member or are approved by the club committee, and who, upon such introduction or approval and upon payment according to the rules of the club, are admitted to the privileges of members, according to the rules of the club, for some specified period. It is not necessary to decide the point, but in such a case I am inclined to think the person to whom such privileges are accorded might fairly be regarded as becoming, for the time, members of the club, subscribing to its funds. But upon the facts appearing in the case, it appears to me that this club is really carrying on the business of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf, and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for income tax. Whether, when the account is properly taken, there is any profit balance, and what the proper method of assessment is, this Court has not to decide on the appeal before us. The learned judge in the Court below has not approved of the principle of assessment upon which the taxing authority has proceeded, and he has remitted the case to the Commissioners to ascertain the proper apportionment of the total expenses of the club on common items which should fall upon the members and visitors respectively. I entirely concur with him in this view. I concur with him also in holding at the same time that the question of the liability of the club to assessment to income tax in respect of their receipts from visitors should be answered in favour of the Crown.

This appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *James & James, for Clutterbuck, Trevenen & Steele, Carlisle.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

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April 17, 18.

[IN THE COURT OF APPEAL.]

GOULD v. CURTIS.

Revenue—Income Tax—Deductions—Premium on Life Insurance—Sum payable on Death before, and Larger Sum if alive, on Certain Date—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54.

An insurance contract, whereby, in consideration of an annual premium, 100*l.* is payable on the death of the assured within fifteen years and 200*l.* if he is alive at the end of that period, is an "insurance on his life" within the meaning of s. 54 of the Income Tax Act, 1853, and the assured is entitled to deduct the whole amount of the premium from his assessment to income tax.

Decision of Hamilton J. [1912] 1 K. B. 635, affirmed.

Observations in *Joseph v. Law Integrity Insurance Co., Ltd.* [1912] 2 Ch. 581, approved.

APPEAL from a decision of Hamilton J. (1) upon a case stated by Commissioners of Income Tax.

The case stated was as follows :—

Gould appealed against an assessment to income tax made upon him, under Sched. D, for the year ending April 5, 1911, and claimed that he was entitled to a deduction therefrom of 1*l.* 1*s.* 8*d.*, being the whole of the premium paid by him under a policy of assurance dated March 12, 1908.

By the policy, in consideration of an annual premium of 1*l.* 1*s.* 8*d.*, the assurance company covenanted that, if the assured should die before March 1, 1923, they would pay 100*l.* upon his death, or would pay the sum of 200*l.* if he should be living on that day. A policy in that form was called a "double endowment assurance" policy. The form of proposal, which was filled up and signed by Gould for the purpose of effecting this insurance, contained the questions and particulars usual in proposals for ordinary life insurance. The premium was actuarially calculated as on a series of alternative risks dependent on the assured's life, that is to say, the respective chances of the assured's dying before March 1, 1909, and before each subsequent March 1 up to and including 1923, and the

(1) [1912] 1 K. B. 635.

premium was calculated in regard to such fifteen chances and on the amounts payable in respect of their respectively happening. The risk was estimated by actuarial calculations based on a recognized table of mortality. The appellant admitted that he took out this policy partly as an investment of money, his main object being to make provision for people if he died.

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“Endowment policies,” assuring sums payable on and in the event of the assured attaining a particular age, no payment being made in case of previous death, had been in use since 1805. About 1840 there first came into use policies under which the right to payment on reaching a certain age was combined with the right to payment on death; under these policies payment was to be made either (a) at a particular date or on the previous death, or (b) on attaining a particular age or on the previous death. This kind of assurance constitutes more than one-half of the business (other than industrial assurance) of some of the life assurance companies.

Where under such policies the same sum was payable at death or at the alternative time therein mentioned, a deduction for the purposes of assessment to income tax, under s. 54 of the Income Tax Act, 1853 (1), equal to the whole premium, but not exceeding one-sixth of the income, was invariably allowed, but only as a concession and without any admission of legal right except as to such part of the premium as would be applicable to the sum payable at death.

The surveyor of taxes did not object to a deduction in respect of so much of the premium as was attributable to the sum payable on death before March 1, 1923, but contended that, as to the alternative amount payable if the assured was alive

(1) 16 & 17 Vict. c. 34, s. 54: “Any person who shall have made insurance on his life . . . or shall have contracted for any deferred annuity on his own life . . . in or with any insurance company which shall become registered . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract . . . from any profits or gains in respect of which he shall be liable to be assessed under either of the schedules (D) or (E) of this Act . . . Provided always that no such abatement allowance or repayment as aforesaid shall be made in respect of any such annual premium beyond one-sixth part of the whole of the profits or gains of such person so chargeable as aforesaid”

C. A. on March 1, 1923, the insurance was not an "insurance on his
1913 life" within the meaning of s. 54.

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The Commissioners decided that the policy was not only a policy of life insurance, but also a contract for an investment, and that part only of the premium was applicable to the life insurance risk; and that only that part of the premium could be deducted, the amount being a matter for actuarial calculation.

On appeal that decision was reversed by Hamilton J., who held that by the policy in question the assured had effected an "insurance on his life" within the meaning of s. 54, and was entitled to deduct the whole amount of the premium from the profits or gains in respect of which he was liable to be assessed.

The respondent appealed.

Sir J. Simon, S.-G., and W. Finlay, for the appellant. A contract in consideration of an annual payment to secure a deferred payment of a lump sum on a certain date if the assured shall then be alive is not an "insurance on his life" within the meaning of s. 54 of the Income Tax Act, 1853. If it be so, it is difficult to see why the section should go on to provide for the case of a person contracting for a "deferred annuity on his own life," seeing that that would be within the contractual provision for a benefit to himself dependent upon the continuance of his own life which it is contended that "insurance on his life" means.

Sect. 54 of the Act of 1853 draws a distinction between an "insurance on life" and a contract for a deferred annuity, the inference being that a contract for the payment of a deferred lump sum was intended to be excluded. The Income Tax Acts contain no definition of "life insurance," and definitions contained in statutes passed for different purposes are not helpful in determining the question now before the Court. The definition of life insurance given by Parke B. in *Dalby v. India and London Life Assurance Co.* (1) exactly applies and is in favour of the contention of the Crown. That definition is as follows: "The contract commonly called 'life assurance,' when properly considered, is a mere contract to pay a certain sum of money on the death of a

(1) (1854) 15 C. B. 365, 387.

person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed it is constant and invariable.”

[KENNEDY L.J. Looking at the whole contract in this case, is it not “an insurance on life” ?]

It is all one bargain, no doubt, and it is not contended that a mere incident in the contract (substantially a life assurance) would take it out. Here each part of the contract is equally substantial.

[COZENS-HARDY M.R. referred to *Prudential Insurance Co. v. Inland Revenue Commissioners*. (1)]

That case turned upon the definition in s. 98 of the Stamp Act, 1891, and although at first sight it seems to be against the contention of the Crown, yet, when examined, it is really in favour of it. Channell J. there recognized that a contract of life assurance was not so wide as a contract of assurance upon an event or contingency relating to or depending upon any life.

That case was followed in *Joseph v. Law Integrity Insurance Co.* (2), where Farwell L.J. adopted what was said by Holmes L.J. in *Flood v. Irish Provident Assurance Co.* (3)

In *Joseph v. Law Integrity Insurance Co.* (2) the company were bound to be defeated if any portion of the business they were carrying on came within the class of insurance on life. But the real question for decision in this case turns upon the meaning of s. 54 of the Act of 1853. The submission is that the Legislature intended the words “insurance on his life” to have the same meaning as they had in 1806, when they certainly would not have included a contract insuring the payment of a lump sum during the life of the assured.

Danckwerts, K.C., and *St. J. G. Micklethwait*, for the respondent. The decision of Hamilton J. was right. This was an “insurance on his life” within the meaning of s. 54 of the Act of 1853. The history of the legislation on the subject is sufficient to shew that in 1853 the Legislature was well aware of the existence of this kind of insurance, and if it had been intended to exclude it from

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(1) [1904] 2 K. B. 658.

(2) [1912] 2 Ch. 581.

(3) [1912] 2 Ch. 597.

C. A. the benefit of the exemption it would have been plainly so
1913 provided in the Act.

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Sect. 54 only applies to contracts with insurance companies.
See also *Colquhoun v. Heddon*. (1)

[BUCKLEY L.J. In *Prudential Insurance Co. v. Inland Revenue Commissioners* (2) Channell J. says a contract of insurance must be a contract for the payment of a sum of money, or for some corresponding benefit to become due on the happening of an event, which event must be of a character more or less adverse to the interest of the person effecting the insurance.]

That was dissented from in the Irish case reported in a note to *Joseph v. Law Integrity Insurance Co.* (3) [They also referred to *Dalby v. India and London Life Assurance Co.* (4) and *Godsall v. Boldero*. (5)]

Sir J. Simon, S.-G., in reply.

[BUCKLEY L.J. What is the difference between "insurance" and "assurance" ?]

According to the Oxford Dictionary the terms have been used indiscriminately for contracts relative to fire, life, and shipping. It is not suggested that there is any difference. The meaning of either word is "making something certain."

The expression "insurance on life" has been used in a chain of Income Tax Acts, and in this section of the Act of 1853 the second branch of exemption means something which is not included in the first. An "insurance on life" is limited to payments to be made in the event of death, and does not include a contract under which the assured is entitled to receive a lump sum of money during his life.

[*Danckwerts, K.C.*, referred to the Life Assurance Companies Act, 1870.]

COZENS-HARDY M.R. This appeal raises an important question upon the true construction of s. 54 of the Income Tax Act of 1853. The question is really whether the right to an abatement in respect of premiums payable by a man on a policy on his

(1) (1890) 25 Q. B. D. 129.

(2) [1904] 2 K. B. 658, 664.

(3) [1912] 2 Ch. 597.

(4) 15 C. B. 365.

(5) (1807) 9 East, 72.

life includes payments made by him in respect of a policy, which is often called an endowment policy, under which 100*l.* is payable in the event of his death within fifteen years and a lump sum of 200*l.* if he survives the fifteen years; or whether the benefit conferred by s. 54 is limited to the case in which a sum of money is insured payable only to his executors, administrators, or assigns on his death.

Hamilton J. has held that an endowment policy of the nature I have described is within the section, and I agree with his decision.

This is a case in which, no doubt, it is useful for some purposes to go back to the history of the income tax and of the legislation with reference to this particular abatement or allowance. In the Act of 1799 (39 Geo. 3, c. 13) there is found in the schedule (1) a provision which entitled certain people to have an abatement in respect of their premiums, the language being the same as in the Act of 1806 (46 Geo. 3, c. 65): "Persons who have made or shall make insurance on their respective lives, or on the lives of their respective wives, shall be at liberty, in addition to any other deductions, to deduct the amount of the premium of such insurance for the current year." Then there is this provision: "Persons entitled to any income during and depending upon the life or lives of any other person or persons who have made, or shall make, insurance on the life or lives of such other person or persons, shall be at liberty, in addition to any other deductions, (except the deduction hereinafter mentioned) to deduct the amount of the premiums of such last mentioned insurance for the current year; provided that if, after the death of such other person or persons on whose life or lives such insurance shall have been made, the income, or any part thereof from which such premiums have been deducted, shall be continued, or the estate from whence the same arose renewed, or shall have been usually continued, or the estate from whence the same arose shall have been usually renewed by the payment of a fine or fines, then and in such case no deduction shall be

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(1) The schedule to 39 Geo. 3, c. 13, was repealed, and a new one substituted for it by 39 Geo. 3, c. 22.

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allowed" The first provision which I have just read was No. 5 in the "General deductions from Income" given in the schedule. The next one, No. 6, is much wider and seems to give exemption to premiums not only paid in respect of a man's own life or his wife's life, but of other people too on their lives. That was a statute which in no way referred to insurance companies. It was perfectly general, and that was continued for relevant purposes in the Act of 1806, which I have before me. The words of s. 178 of that Act are: "That in case any person shall have duly claimed and proved his title to such allowance as aforesaid for income less than 150*l.* per annum, and such person shall have made insurance on his life or on the life of his wife, the amount of the annual premium whereon shall have been included in the amount of such income, there shall be granted out of the duties so charged a further allowance bearing the like proportion" That fell to the ground when the income tax was abolished in 1815, and from 1815 until 1842 or 1843 there was no such thing as income tax. When the income tax was first reimposed by Sir Robert Peel there was no corresponding abatement allowed in respect of premiums on policies. Then we come to 1853, the income tax having been continued, as we know, from time to time up to that date. It is important to observe the enactment in the Act of 1853 in two points. First of all, it is limited to contracts of insurance with an insurance company, whereas the old Acts had no such limitation. In the next place there are words here added to the former words: "who shall have made insurance on his life or on the life of his wife, or shall have contracted for any deferred annuity on his own life or on the life of his wife, in or with any insurance company." It was contended on behalf of the Crown that in construing these words we must suppose that that language in 1853 had precisely the same meaning as it had in 1799 or in 1806. I do not assent to that. I think in 1853 Parliament was dealing with a perfectly well known, well established, and very large class of business, namely, the business of insurance companies which entered into contracts of insurance on people's lives to an enormous amount; and in order to consider the meaning of the words used in 1853, limited as they

are to contracts with insurance companies, I decline to refer for that purpose to the meaning of those words in the Acts of 1799 or 1806, which had no special reference whatever to insurance companies.

Now what was the meaning of those words "contract of insurance on his life or on the life of his wife" as understood commonly in the business world, by insurance companies, and by other people in the year 1853 and onwards? I think the shortest way in which I can deal with this proposition is to repeat what I said in *Joseph v. Law Integrity Insurance Co.* (1) I thought it was legitimate to look at works of authority on the branch of law dealing with this matter, and I referred to Mr. Bunyon's book as a book of authority on this subject, the first edition of which was written in 1853 and published in 1854. It was contemporary with this Act. It was not dealing with a subject which was then first started, but it was dealing with what was well known in the insurance world. Mr. Bunyon gives this as a definition of life insurance: "The contract of life insurance may be further defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." Is not that a legitimate thing to refer to, having regard to the statements which we find in the special case? "Instruments known as endowment policies," we are told, "assuring sums payable on and in the event of the assured attaining a particular age, no payment being made in the event of his or her previous death, have been in force since 1805." And "About 1840"—that is thirteen years before this statute—"there first came into use policies under which the right to payment on reaching a certain age is combined with the right to payment on death. Under these instruments sums were contracted to be paid either (a) at a particular date or on the previous death of the assured; or (b) on the assured attaining a particular age or on the previous death of the assured. This kind of assurance constitutes more than one half of the business (other than industrial assurance) of some of the life assurance companies at

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(1) [1912] 2 Ch. 581.

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the present time." Therefore the subject-matter with which we are now dealing was one with which in the year 1853 insurance companies were dealing largely. It is a topic which must have been familiar to any writer of authority who was considering what the meaning of insurance on his life was at that date. I think, therefore, that there is no reason to doubt, and as far as I am concerned I feel no doubt, that under the language of that section the policy in question is a "contract of insurance on his life," and none the less because in the event of his surviving fifteen years, which is a contingency dependent upon the continuance of his life, of course, he will receive 200*l.*, although in the other event, in the event of his death before the expiration of fifteen years, his executors will only receive 100*l.*

It has been suggested that this cannot be a contract of insurance because the continuance of life is not an event which can be fairly said to be adverse to the interests of the insurer. This is based really upon a passage in the judgment of Channell J. in the *Prudential Company's Case*. (1) He was there dealing with an argument which had been addressed to him by counsel. Dealing with the case of an insurance by a man who was of the artisan class, with small weekly payments, he pointed out that a payment made to a man in that class when he attains sixty-five, or whatever the age might be, is one which may be fairly said to contemplate an adverse event to the man who probably might not then be able so well to maintain himself and his wife. If, however, the learned judge intended to lay down that there cannot be a contract of insurance unless the event is of a character more or less adverse to the interests of the person effecting the assurance, with the greatest possible respect to the learned judge, I do not think that is accurate. I do not think it is true to say that there can be no insurance except the event covered by the contract is one which is in its nature adverse to the assured.

I do not think it really necessary to consider the puzzle which arises upon the subsequent words of the section, "or shall have contracted for any deferred annuity on his life or on the life of his wife." This document is in the form of an assurance policy on

(1) [1904] 2 K. B. 658.

the assured's own life, and it is called an "own life policy." It is not a deferred annuity policy. I think those subsequent words were inserted in order to remove any doubt which there might have been as to whether a deferred annuity policy could be considered to be an insurance "on his life," or on the life of his wife. This policy in question seems to me to come within the first words of s. 54, and there is nothing, either in the prior legislation or in the prior decisions, which justifies us in coming to a different conclusion.

With reference to the case recently before this Court, *Joseph v. Law Integrity Insurance Co.* (1), although it turned upon the construction of words in a different Act of Parliament, yet I think the observations made by every member of this Court in that case, though they may be mere dicta, are really dicta which in the present case, as far as I am concerned, must now have the force of a decision.

I think this appeal fails and must be dismissed with costs.

BUCKLEY L.J. The respondent Gould is the holder of a policy under which an insurance company have covenanted with him that if he should die before March 1, 1923, they will pay 100*l.* on his death, or if he should be living on that day they would at that date pay him 200*l.* The annual premium is 11*l.* 11*s.* 8*d.* The question is whether he is entitled to have an allowance by way of deduction of that annual premium under s. 54 of the Income Tax Act, 1853. Hamilton J. has held that he is. In my opinion that is right.

The question is one of construction of s. 54. The section commences by specifying two matters between which occurs the disjunctive "or," and it is argued, I think quite soundly, that when you find the expression "A" or "B" you ought as a matter of construction, if you can—unless driven to a contrary conclusion—to say that B is an alternative to A and is not included within A. It is contended that that principle of construction ought to be applied to this Act, that the words after "or" include deferred payments during life, and that such a payment is therefore excluded from the previous words "insurance

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on his life." But take the case, it is a possible case, I suppose, of a deferred annuity commencing on the death of the assured, or commencing in his lifetime and continuing for say ten years after his death. That will be included in the words following the word "or." The words occurring after the disjunctive are therefore words characterized not by the quality of being payable during as distinguished from at or after the death but by the quality of periodicity of payment. To give full effect therefore to the rule of construction it is not necessary to say more than that the first words do not include periodical payments of that kind.

The contrast of the antithesis of the two phrases may lead to the exclusion from the former of periodical payments, but does not tend to any determination at all as to when the payment of a lump sum as distinguished from a periodical sum is to be made. It may be a sum payable at death or a sum payable at an earlier date dependent upon a contingency, namely, the contingency of living at that time. An argument was advanced that the word "on" in the connection "insurance on his life" is confined to a payment to be made at the death. If that is so, then an annuity "on" the life must equally be an annuity commencing at the death. No one can say that it is. It may be and generally is an annuity current during the lifetime and terminating on the death. An annuity "on" life cannot be confined to something payable at death. By parity of reasoning an insurance on life is not confined to a payment to be made at death.

What then is the true meaning of the words "insurance on his life." There would, to my mind, be a significant difference if the preposition were "of" and not "on." I can agree that the phrase "insurance of the life" may as matter of English mean a guarantee of a sum to be paid if the life drops. Insurance "on" it is, to my mind, a different thing. It means the insurance of a sum dependent upon it. The life is mentioned as a contingency upon which the insurance is to be paid. The contingency is death or no death—death or life. Insurance "on" life is an insurance of a sum payable or not payable according as the contingency of life or death is answered

one way or the other. Regarded thus, it is plain that an insurance "on" life includes as much an obligation to pay a sum of money if life continues at a date as an obligation to pay a sum of money if life ceases. An insurance "on" life expresses an obligation to pay a sum of money on an event dependent upon the contingency of human life. If that be sound, it follows that the whole of this premium is deductible, because this is altogether an insurance "on" life.

I wish to add a word as to something which was said by Channell J. in the case of *Prudential Insurance Co. v. Inland Revenue Commissioners*. (1) The particular words to which I venture to take exception are these, at p. 664: "which event must have some amount of uncertainty about it, and must be of a character more or less adverse to the interest of the person effecting the insurance." The learned judge was using those words in connection with a policy of life insurance, and he gave a reason there why he thought there was in that case an adverse risk. As to that I say nothing; but what I want to say is this: If the policy be one such as a fire policy, or a marine policy upon a vessel, it is a policy of indemnity, an obligation to indemnify. In insurances of that class I agree that what you look at is to see whether there has occurred an event adverse to the person who is insured, such as that, having suffered a loss by reason of that adverse event, he is to be indemnified by the sum which is guaranteed to him under the policy. The same is not true of a policy of life insurance. A policy of life insurance is not a policy of indemnity, but is a policy upon a contingency. Death cannot for this purpose be appropriately described as an adverse event. It is an event which some people regard as adverse, and some do not. But for this particular purpose it is not adverse, for it is not in the sense that it occasions pecuniary loss, which is what is meant in the case of a fire or marine policy. The obligation in a policy of life insurance is not based upon any doctrine of compensating the person for the event. Money is no compensation for death. An insurance upon life is the creation in favour of a person who has an insurable interest of an obligation to pay money in an event, namely, the contingency

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(1) [1904] 2 K. B. 658.

C. A. of human life. Whether the contingency be the continuance of
1913 life at a date or whether it be death, in both cases it seems to
me that it is included within the expression "insurance on life"
contained in s. 54.

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For those reasons I think that this policy-holder was the holder of a policy the whole of the premiums upon which he was entitled to deduct under the provisions of s. 54, and the result is that I think this appeal should be dismissed.

KENNEDY L.J. I am of the same opinion. We have had a good deal of most interesting discussion as to the proper construction of statutes in general, and of this statute in particular, and a good deal of discussion as to what ought to be the meaning of the word "on" when you speak of an insurance or a policy on life. The most important thing to bear in mind is, that the whole scheme of this legislation, beginning at the end of the eighteenth century and continuing until to-day, is the encouragement of thrift. That is the base principle of such legislation as this. In order to encourage thrift there is an exemption from taxation to a certain extent, which is an exemption in respect of sums of money devoted by the subject who is taxed to assuring at a subsequent date for the use of his family, whom by law he is bound to support, or himself, of course, if he is the only person still living, or to his family or his creditors when he dies, of a sum of money; and the object of the legislation must be carefully borne in mind as a matter alike of justice and common sense, when you have to construe legislation which refers to taxation of this kind. The law intended to give the taxpayer some relief in respect of such sum as he was paying as a thrifty person, in order to encourage such thrift generally.

So approaching the statute it seems that one is entitled, in the first instance, to look without favour upon an interpretation which would arbitrarily limit the form which that thrift should take. It seems to me that it cannot matter for that purpose whether the sum to be insured and for which present payment or payment in premiums is made is a lump sum payable in the case of death or a lump sum payable if the assured survives a certain time. It seems to me that it ought to require some

very cogent reason of construction in order to interfere with the plain and universal policy of such legislation as this. When we come to this particular clause it is contended that although that may be the principle, the construction of the words, read as a statute ought to be read, according to the natural meaning, does not allow of the principle being carried out.

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I agree with Hamilton J. that there is a great deal of force in the point that was put with regard to construction; that if you disjoin two classes of things, and by disjoining them assert necessarily a degree of difference between them, *prima facie* you ought not as a matter of construction to include in the first the second which has been disjoined from it. But I entirely agree with the Master of the Rolls in saying that in this you ought not to look at this matter from a highly technical standpoint, but at what I may call the popular sense of the words. It is legislation in regard to life insurance. Life insurance in the year 1853, as now, was not limited, and never has been limited, to the mere contract for a payment upon death. The statute is enacted in terms which had a popular and perfectly understood meaning, and when I say popular I do not mean in a sense different from that which would be understood by commercial and business men who had to deal with this class of business: I mean popular as opposed to a limited and technical sense. In this case I agree that we cannot do better than do what his Lordship did in the beginning of his judgment in *Joseph v. Law Integrity Insurance Co.* (1), by taking Mr. Bunyon's book on Life Assurance and saying that, if you speak of a contract of life insurance, or an insurance on life, it may be defined to be "that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life." It is an insurance on the subject of life, or, as was put by the Irish judges in the case which is now reported, really it may be expanded to being an insurance, in one sense, upon a life; that is, either where the payment is upon that life ending, or in reference to the duration of the human life. Here the contingency, apart from death, upon which by the contract the assured is entitled to payment of a lump sum, is that of his

(1) [1912] 2 Ch. 591.

C. A. surviving a certain number of years. That is a contingency, or
1913 an "event contingent" (to keep to the exact words of Mr.
GOULD Bunyon's work) "upon the duration of human life." I agree
v. with Buckley L.J. as to the importance of remembering that the
CURTIS. word is "on" and not an insurance "of," and I should not
Kennedy L.J. personally be afraid of saying that the Legislature was anxious
in adding the other alternative which is disjoined, to prevent its
being said by any possibility that that was a form of insurance
which was not intended to be covered by the earlier legislation,
although the earlier phrase might in fact include it.

I have only to add that with regard to the judgment of Channell J. in the case in the year 1904, which we generally approved in the judgment in *Joseph v. Law Integrity Insurance Co.* (1), I am not disposed at all to differ from the criticism that has been used, if we are to construe it strictly, of the word "adverse" in the judgment of Channell J. I approved that judgment in my own terms, and I am still of opinion that, while it is quite right that in this case it should go forth that there may be question as to "adverse" being universally a proper test, I think as used by Channell J. it represents a real and not an immaterial fact. In a sense, and particularly with regard to the insurances effected by workmen for small weekly payments, it may well be said that such an insurance against what may happen to the man or to his family in regard to the possibility of wage-earning at a later period of his life is an insurance against an adverse event, namely, the coming of a time when, although he is still living, it may be more difficult or even impossible for him to earn wages as before. In the same way you may use the word "adverse" in speaking of death. It is equally true that, speaking generally (and we are not legislating in the clouds, but for actual human events that happen in the community), death is an adverse event as regards the family and creditors, and that is why a creditor has an insurable interest in the life of his debtor. You desire to guard (and I think my brother Channell had that in view throughout) against the happening through old age or death of an event which, unless you provide against it by thrift, will result, I will not say in

(1) [1912] 2 Ch. 381.

adversity or anything adverse, but in a position of pecuniary disadvantage against which the thrifty person desires, and rightly desires, to insure himself, or his family or his creditors.

Therefore there is, in that sense, in reference to a contingency relating to the duration of human life, the happening of an event—of course it is not like the burning of a house or the destruction of a ship, and has no reference to the question of indemnity—but an event which places a man from a pecuniary point of view in a less favourable position than he otherwise would have occupied. Therefore while I agree that the word “adverse” may not be quite the right word to use as a universal test, still I think it was properly used in reference to the policies which Channell J. was considering.

I agree in this particular case, on the construction of this particular section, that the decision of my colleagues for which they have fully stated their reasons is the right one.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitor for respondent: *A. E. Pratt.*

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April 15.

EVANS v. GWENDRAETH ANTHRACITE COLLIERY
COMPANY, LIMITED.

Coal Mine—Supply of Explosives—“Actual net cost to the owner”—Cost of Carriage—Cost of Distribution—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 61, sub-s. 2.

Sect. 61, sub-s. 2, of the Coal Mines Act, 1911, provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner:—

Held, that the “actual net cost to the owner” includes the cost of carriage to the owner’s magazine, but does not include the cost of distribution from the magazine to the workman.

APPEAL from the Llanelly County Court.

The plaintiff was a collier in the employment of the defendants, who were colliery owners. The defendants had supplied explosives to the plaintiff at a price which, over and above the amount attributable to the invoice price and the cost of carriage of the explosives to the defendants’ magazine, included a proportion

- (1.) of the cost of delivery from the magazine to the workmen,
- (2.) of the cost of attending to the magazine and of office expenses, and
- (3.) of interest on the cost of erecting the magazine and of the licence in respect thereof.

Sect. 61, sub-s. 2, of the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), provides that no explosives shall be taken into or used in any mine except explosives provided by the owner, and the price, if any, charged by the owner to the workman for any explosives so provided shall not exceed the actual net cost to the owner.

The plaintiff in substance alleged that he had been overcharged in so far as the price of the explosives included the proportion of the three items of cost mentioned above.

The action took the form of a claim to recover a sum of 3s. 1½d. the balance of wages alleged to be due from the defendants to the plaintiff. The defendants paid a sum of 1s. 4d. into Court. The balance of 1s. 9½d. they claimed to

retain as being the proportion of the three items of cost above mentioned, which they contended were properly included in the net cost price to the owners of the explosives supplied to the plaintiff between July 1, 1912, and October 26, 1912.

The deputy county court judge gave judgment for the plaintiff for the sum of 1s. 4d. paid into Court together with a sum to be ascertained as the proportion attributable to items 2 and 3, but held that the actual net cost to the owner included the cost of delivery from the magazine to the workman, and that the defendants were entitled to retain in respect of item 1 the difference between 1s. 9½d. and the ascertained sum.

The plaintiff appealed.

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Atkin, K.C., and Meager, for the appellant, The question is what is the actual net cost to the owner? The answer is the value of what he gets minus what it costs him to get it. In *Dobbs v. Grand Junction Waterworks Co.* (1) Lord Bramwell said: "The difference between what a thing costs and the larger sum it sells for is not profit if the buying and selling are attended with expense to the trader." That passage indicates three quantities, the cost to a vendor, expense of buying, and expense of selling. When the Legislature used the expression "actual net cost to the owner" it never meant to include the expense of selling, which would involve minute calculation as to how much of the cost of erecting a magazine is properly chargeable for a pound of explosive delivered therefrom to a miner. The actual net cost of an article to the owner might include all necessary cost up to the time when the owner gets the article into his possession; for example, the invoice price plus the cost of carriage from the point of delivery under the contract of sale to the owner's premises; but, that point having been reached, no expense subsequently incurred can be included in the actual net cost to the owner. The county court judge relied on a case before the Privy Council, *Bulawayo Municipality v. Bulawayo Waterworks Co.* (2) In that case the waterworks company contracted to supply electric light, and the municipality contracted to pay for the same at such rates as would yield to the contractors a

(1) (1883) 9 App. Cas. 49, at p. 55.

(2) [1908] A. C. 241.

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return equal to 10 per cent. over "the actual cost of generating the light." The Privy Council held that the actual cost of generating the light covered all that the production of the light cost, including depreciation of plant, rent, rates, taxes, and insurance. That case bears no analogy to the present case, for in the present case what the defendants are entitled to demand is not the actual cost of producing the explosive but the actual net cost of obtaining it. If the deputy county court judge had logically applied *Bulawayo Municipality v. Bulawayo Waterworks Co.* (1) he ought to have allowed the defendants to retain the proportion of all three items.

J. Sankey, K.C., and *E. M. Samson*, for the respondents. The "actual net cost to the owner" means what it costs the owner to provide the explosive to the miner. That depends upon where it is delivered to the miner. If it is delivered to the miner at the owner's magazine, the actual net cost to the owner includes the cost of delivery from the manufactory to the owner's magazine. If the explosive is delivered at the mine, the actual net cost includes the cost of delivery from the manufactory to the magazine and from the magazine to the mine. In this case the explosive was delivered at the mine. It follows that item 1 is properly taken into account.

CHANNELL J. It was the obvious intention of the Legislature that the mine owner was not to make a profit out of supplying explosives to the miners working in his mine; but what the framers of this Act would have said if asked whether "the actual net cost to the owner" was to include such minute items as the proportion of establishment charges and of the wages of a man for distribution of the powder among the miners, and such like, it is very difficult to tell. In using the words "the actual net cost to the owner" the Legislature probably meant to distinguish between cost of obtaining and expenses of handling. In the main the provision is for the benefit of the mine owner. The supply of explosives is placed in his control so that he may determine and direct what explosive shall be used and see that explosives of no other kind or quality are used. This is a

(1) [1908] A. C. 241.

substantial advantage to him. Then what is the cost of obtaining as distinguished from expense of handling? It is what the mine owner pays for the article as delivered to him. It would include the invoice price at any rate. The cost of carriage to his premises would also be included. The question is whether the phrase "actual net cost to the owner" means cost at the time when the owner gets the article into his possession, or cost down to the time when he distributes it to the miners. In my view the cost between the time when he gets, and the time when he distributes, is rather expense of handling than cost of obtaining. It is certainly desirable to lay down some practical rule which will deal with appreciable quantities rather than with fractions running to several places of decimals, and I have come to the conclusion with some hesitation that the county court judge was wrong in allowing any sum representing the proportion of the wages of a man for distributing the explosives to the miners. In my opinion, therefore, this appeal should be allowed.

LORD COLERIDGE J. I am of the same opinion. By the Act the mine owner is to monopolize the provision of explosives in his mine. That is an advantage to him. A corresponding advantage is given to the miner. He may indeed use no other explosives than those supplied to him, but the price of the explosive is fixed in his interest. The price is not to exceed the "actual net cost to the owner." The question is whether that means actual net cost to the owner at the time when he acquires the substance or the actual net cost at the time when he provides it. If it means the first it would include the cost of delivery to the owner's works in whatever quantities it might be delivered. That would clearly be part of the actual net cost. Cases where the owner at his own cost pays part of the expense of delivery at his premises not included in the invoice price need not be considered now. In the present case there is no question as to the price at which the mine owner acquired these explosives. The question is whether we should take as the standard that price, or that price enhanced by the cost of distribution among the miners. If the latter were the standard the miner would have no voice in the economic distribution of explosives; the

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owner would be able to throw upon the miner the expense of distribution without any corresponding power in the miner to regulate that expense. In my judgment the price is the actual net cost to the owner at the time when he receives the explosive into his premises. Any further expenses must be either establishment charges (which the respondents do not claim in this case) or the cost of handling and distribution. These I do not think were intended to be included for the reasons I have given. I therefore think that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *J. T. Lewis, for Randall, Saunders & Randall, Llanelly.*

Solicitors for respondents: *C. & W. Kenshole, Aberdare.*

W. H. G.

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Poor Rate—Appeal to Quarter Sessions—Valuation List—Notice of Objection to, after Approval by Assessment Committee—Unfairness in Valuation of Hereditament in respect of which Person other than Objector is rated—Right of Objector to give Notice of Objection to other Person at any Time—Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18—Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1.

Although a ratepayer who desires to object to a valuation list before it is approved by the assessment committee must under s. 18 of the Union Assessment Committee Act, 1862, give the notices of objection prescribed by the section before the expiration of twenty-eight days after notice by the overseers of the deposit of the list, he can, if after the approval of the valuation list he desires to appeal to quarter sessions against a rate made in conformity with the list upon the ground of unfairness or incorrectness in the valuation of a hereditament in respect of which another person is liable to be rated, give under s. 1 of the Union Assessment Committee Amendment Act, 1864, notices of objection against the valuation list to the assessment committee, the overseers, and the other person at any time after the approval of the list.

Query whether it is necessary as a condition precedent to an appeal by a ratepayer to quarter sessions against a rate made in conformity

with a valuation list approved by the committee that he should give notice of objection against the valuation list to any persons other than the assessment committee.

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RULE NISI obtained at the instance of the appellants, the Bristol Waterworks Company, calling upon the Recorder of Bristol to shew cause why a writ of mandamus should not issue, directed to him, commanding him to hear and determine, pursuant to the statutes in that behalf, the merits of an appeal between the appellants and the assessment committee of the Bristol Union, the overseers of the poor of the parish of Bristol, and the guardians of the poor of the parish of Bristol, respondents to the appeal (whereby the appellants appealed against a poor rate made on April 1, 1911, in conformity with a valuation list deposited on February 12, 1910, in respect of the assessment of certain properties of the respondent guardians), upon the ground (inter alia) that notice of objection to the valuation list on the ground that the property of a third party was underrated need not be given within the twenty-eight days mentioned in s. 18 of the Union Assessment Committee Act, 1862.

The appellants own and occupy certain hereditaments and premises within the city and county of Bristol (which forms a single parish) in respect of which they are assessed to the poor rate.

The guardians of the poor of the parish of Bristol own and occupy (amongst other premises) certain workhouses in respect of which they are assessed to the poor rate.

On February 12, 1910, the valuation list for the parish of Bristol was deposited, and it was finally approved on March 24, 1910. On May 30, 1911, the appellants, feeling aggrieved by the valuation list on the ground of the unfairness and incorrectness in the valuation of the workhouses (the gross sum assessed to the poor rate in respect of the workhouses being less than the true gross estimated rentals), gave notices in writing of their objection to the valuation list to the assessment committee of the Bristol Union and to the overseers and guardians of the poor of the parish of Bristol, the last-mentioned persons being the persons liable to be rated in respect of the workhouses to the valuation of which the appellants objected. At an adjourned meeting of the

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assessment committee on December 19, 1911, the committee, having been previously advised by their clerk that notice of objection by the appellants to the rating of the guardians' premises could not be given except within twenty-eight days of the deposit of a new or supplemental valuation list, dealt with the appellants' objections to the valuation list deposited on February 12, 1910, by making no alteration in that list, but by ordering (under s. 26 of the Union Assessment Committee Act, 1862) the overseers to make and deposit a supplemental valuation list, which was accordingly done on February 16, 1912, and the supplemental list was approved by the assessment committee on March 25, 1912. No notice of objection to the supplemental list was given by the appellants.

The appellants, being aggrieved by the valuation list deposited on February 12, 1910, and having failed to obtain such relief in the matter as they deemed just, gave notices in writing on December 30, 1911, to the assessment committee, the overseers, and the guardians, of their intention to appeal against the poor rate made on April 1, 1911, to the next general quarter sessions to be held for the city and county of Bristol.

The next general quarter sessions were held on January 10, 1912, and the appeal having been duly entered and respited and further respited by consent at subsequent sessions, came on for hearing at the general quarter sessions for the city and county of Bristol on January 8, 1913, when a preliminary objection on behalf of the guardians was taken to the hearing of the appeal on the ground that notice of objection to the valuation list had not been given by the appellants to the guardians before the expiration of twenty-eight days after the notice of the deposit of the valuation list, as required by s. 18 of the Union Assessment Committee Act, 1862. (1)

(1) Sect. 17 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103): "The valuation list for each parish . . . shall be deposited by the overseers in the place in such parish in which rate-books are deposited . . . and the overseers shall give public notice of the

deposit of such list"

By s. 18 it is enacted that "any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of

It was contended by counsel on behalf of the appellants that the effect of the Union Assessment Committee Amendment Act, 1864, s. 1, was to entitle the appellants to give the notice of objection to the guardians at any time in the manner prescribed by the Union Assessment Committee Act, 1862, with respect to objections, and that the notices required by the Acts had been duly given and that the assessment committee had properly heard the objection of the appellants to the valuation list, and that the appeal to quarter sessions was competent and ought to be then heard and determined.

The recorder upheld the preliminary objection, and without hearing the appeal dismissed it.

The appellants then obtained the rule.

Foote, K.C., and *E. H. C. Wethered*, for the respondents the guardians, shewed cause. By s. 18 of the Union Assessment

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any rateable hereditament from such list, may, at any time after the deposit as aforesaid of such list and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof, and where the ground of any objection shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person, other than the person objecting, is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof, to such other person."

Sect. 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39): "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give

twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that . . . no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

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Committee Act, 1862, any person aggrieved may give notice of objection to the valuation list before the expiration of twenty-eight days after the notice of deposit of the list; and s. 1 of the Union Assessment Committee Amendment Act, 1864, which provides that the assessment committee shall hear any objection "after notice given at any time," applies only to notice given to the committee. Any other notice must be given within the twenty-eight days prescribed by s. 18 of the Act of 1862, and therefore notice to the third party must be given within twenty-eight days, although notice may be given to the committee at any time. That was the view taken by the learned recorder, and it is in accordance with the authorities: *Reg. v. Overseers of Langriville*. (1) In *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (2) it was expressly decided that s. 18 of the Act of 1862 remained in full force with regard to notice in the case of any party except the assessment committee; and that case is indistinguishable from the present case.

Sect. 18 of the Act of 1862 and s. 1 of the Act of 1864 relate to the same right of appeal. There cannot be a right of appeal within twenty-eight days and also a right of appeal at any time. In the Act of 1864 no time is prescribed for giving notice to the third party, but s. 18 of the Act of 1862 does prescribe twenty-eight days, and it is laid down in the *Reigate Case* (2) that that section is not repealed. All three notices, namely, to the assessment committee, to the overseers, and to the third party, must be given within twenty-eight days after notice of the deposit of the valuation list. Sect. 19 of the Act of 1862 directs the committee to cause notice of the meeting for hearing objections to the valuation list other than a meeting by adjournment to be given to the overseers twenty-eight days before holding the meeting, but the notice to the overseers is not a condition precedent to the right of the committee to hold the meeting. But s. 18 does prescribe that notice is to be given within the twenty-eight days to the third party, and no other provision has been substituted for it. Sect. 26 of the Act of 1862, which empowers the committee from time to time to direct

(1) (1884) 14 Q. B. D. 83.

[(2) [1894] 1 Q. B. 411.

a new valuation of all or any of the rateable hereditaments in the parish and a new or supplemental valuation list, provides for any possible ground of hardship.

F. E. Weatherly, for the respondents the overseers.

Ryde, K.C., and *T. W. Inskip*, in support of the rule. The Union Assessment Committee Act, 1862, created the assessment committee and the valuation list. The old right of appeal of a ratepayer against a rate still remained under the Act of 1862 and was recognized by s. 22 of that Act, but the overseers were bound by the valuation list when it was approved by the assessment committee. The Act of 1862 did not impose upon the ratepayer any fresh duty to give any notice before appealing against the rate. It left the old practice as to appeals by the ratepayer against a rate untouched, and he could therefore appeal even though the rate followed the valuation list. That was altered by the Union Assessment Committee Amendment Act, 1864. The words "after notice given" in s. 1 of that Act relate back to the previous words in the section "notice of objection against the said list." The "notice of objection against the said list" is the notice prescribed by s. 18 of the Union Assessment Committee Act, 1862, and the meaning of s. 1 of the Union Assessment Committee Amendment Act, 1864, is that the notice of objection to the valuation list may be given by a ratepayer who wishes to appeal against a rate to all parties at any time. It cannot have been the intention of the Legislature that a ratepayer should be unable to appeal against a rate unless he had given notice of objection to the valuation list within twenty-eight days of the notice by the overseers of the deposit of the list. The result would be that a person buying a house of a rental value of 100*l.* a year and finding it valued in the valuation list at 150*l.* a year would be prevented from objecting and appealing if he bought it after the expiration of the twenty-eight days. If the word "notice" in s. 1 of the Act of 1864 means notice to the assessment committee only, the appellants have complied with the section. But if the word includes notices to the overseers and, where the valuation of the hereditaments of another person is being attacked, to that person, those notices can also be given at any time.

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It would be quite possible for a valuation list to remain in force for twenty years, and it cannot have been intended that if the ratepayer had not objected to it within the twenty-eight days he could not afterwards do so. Before the Act of 1864 the notices mentioned in the Act of 1862 were not conditions precedent to the right of the ratepayer to appeal to quarter sessions against the rate. The only notices he had to give were the ordinary notices of appeal to quarter sessions. The objections under the Acts of 1862 and 1864 are entirely distinct. The notice of objection under s. 18 of the Act of 1862 means notice of an objection to the valuation list before it is approved by the assessment committee, and that objection must be made within the twenty-eight days, but it is not a condition precedent to an appeal to quarter sessions. Assuming that notices of objection to the overseers and to the third party are under s. 1 of the Act of 1864 conditions precedent to an appeal to quarter sessions, they can be given at any time. The only point decided in *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (1) was that the valuation list cannot be approved by the assessment committee before the expiration of the twenty-eight days because the effect of an earlier approval would be to deprive the ratepayer of his right of objection to the valuation list. The decision has no bearing upon the notice of objection by a ratepayer to a valuation list, where the ratepayer desires to appeal to quarter sessions against a rate made in conformity with the valuation list after its approval. The only point decided in *Reg. v. Overseers of Langriville* (2) was that the notice by the assessment committee to the overseers prescribed by s. 19 of the Union Assessment Committee Act, 1862, is not a condition precedent to the right of the committee to amend the list after approval. The practice on appeal to quarter sessions against a rate is indicated in *Reg. v. Kent Justices*. (3) If notice of objection to a third party's assessment is too late after final approval of the list, a notice of objection to the over-assessment of the objector is equally too late; and this would have afforded a short answer in several reported cases, e.g., *Reg. v. Kent Justices* (3), *Reg. v. Denbighshire*

(1) [1894] 1 Q. B. 411.

(2) 14 Q. B. D. 83.

(3) (1870) L. R. 6 Q. B. 132.

Justices (1), and *Rex v. Essex Justices* (2), and would defeat a ratepayer's appeal against his own over-assessment in almost every case. It is inconceivable that the point could have been overlooked in those cases and the inference is that it was thought not to be a good one. [*Ashby v. White* (3) was also referred to.]

Cur. adv. vult.

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April 29. The following judgment was read by

RIDLEY J. This was a rule nisi for a mandamus to the Recorder of Bristol to hear and determine on the merits an appeal to the quarter sessions against a poor rate. The Bristol Waterworks Company were the appellants, and the ground of appeal was that the guardians of the poor were underrated for premises of which they were the occupiers. On May 30, 1911, the waterworks company gave notices of their objection to this assessment to the assessment committee, to the overseers of the poor of the parish of Bristol, and to the guardians of the poor, they being the persons in respect of whose assessment the objection was raised. The valuation list then in force had been deposited in February, 1910, and finally approved in March of that year. When the appeal came on for hearing, the objection was taken that notice of objection to the valuation list had not been given by the appellants to the overseers and to the guardians within twenty-eight days after notice of the deposit of the valuation list, and upon this preliminary objection the recorder dismissed the appeal. The question is whether the appellants were entitled to appeal without having given these notices in accordance with s. 18 of the Union Assessment Committee Act, 1862, and the answer depends on the proper construction of s. 1 of the Union Assessment Committee Amendment Act, 1864.

The valuation list and the assessment committee were established by the Act of 1862; and it was provided that the list should be deposited, that notice should be given of its deposit, and that any person aggrieved by the list might at any time after the deposit of the list and before the expiration of twenty-eight

(1) (1885) 15 Q. B. D. 451.

(2) [1902] 1 K. B. 180.

(3) (1703) 2 Ld. Raym. 938.

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days after notice of the deposit give the committee and the overseers notice of his objection thereto, and, if his objection was to the assessment of any other person, give notice in writing of such objection to such other person. By s. 19 of the same Act the committee were to give twenty-eight days' notice for hearing objections to the overseers before proceeding to hold a meeting or meetings at which to hear the objections. It also contained various other provisions relating to notices which might be given, or directed to be given, to the parties objecting, which it seems unnecessary to set out at length. But there was no provision making these notices and proceedings a necessary condition to an appeal to quarter sessions. That was left subject only to previous legislation. Then in 1864 came the Act 27 & 28 Vict. c. 39, by s. 1 of which it was provided: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

By this Act several alterations were made in the law. The assessment committee were allowed to appear at quarter sessions to support the valuation list; objection was allowed to be made to the list after its approval; and appeals to quarter sessions

were prohibited unless objection had been made to the list before the committee and relief had not been obtained.

This notice is the only one which by this section is made a condition precedent to appeal to quarter sessions, but it was contended that, as s. 18 of the 1862 Act is left unrepealed by the Act of 1864, the notices therein required to be given to the overseers and to third persons must still be given before an appeal can be heard.

This argument appeared to derive some support from the case of *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (1), in which it was decided that the assessment committee must not approve the valuation list till the expiration of twenty-eight days from notice of the deposit, because the ratepayer has that time in which to object; and that if they do so the list will be bad. If the assessment committee must observe the provisions of s. 18, so must the appellant; such was the argument; and therefore the appellant must give twenty-eight days' notice before appeal. The recorder adopted this view, and I was at one time disposed to do so also; but I think on consideration that in truth s. 1 of the 1864 Act is merely ancillary to the provisions of the Act of 1862; it does not deal with notices of objection to the list before its approval, as does the section of the former Act, but with objections to it after approval with a view to appeal to quarter sessions and as a part of the procedure by which the assessment committee is to appear at the hearing. This section directs that this notice of objection may be given at any time, which is inconsistent with s. 18, if they are to be read as relating to the same objection. I do not think the Court in the *Reigate Case* (1) was considering the right of appeal to quarter sessions. I, therefore, think that this case is not an authority for the position that the notices of objection required by s. 18 of the 1862 Act must be given as conditions precedent to an appeal to quarter sessions. They are to be given on a new valuation list being deposited. The notice of objection to the list required for an appeal to quarter sessions is to be given at any time after it is approved.

It does not seem necessary to refer at length to *Reg. v.* (1) [1894] 1 Q. B. 411.

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Langriville (1), which was not decided upon the point now in question.

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For these reasons I am of opinion that the rule should be made absolute.

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AVORY J. read the following judgment:—I agree in the result at which my Lord has arrived, but, as I had written my judgment before I had the opportunity of hearing his, I will read it.

This was a rule nisi for a mandamus to the recorder of the city and county of Bristol to hear an appeal to quarter sessions for the city and county of Bristol by the waterworks company against a poor rate made on April 1, 1911, the ground of appeal being that the guardians of the poor were underrated in respect to their properties in the parish. Notice of the appeal, as required by statute, had on December 30, 1911, been duly given to the assessment committee, to the overseers of the poor, and to the said guardians. A preliminary objection was taken on behalf of the guardians that notice of objection to the valuation list on which the said rate was based had not been given to the guardians before the expiration of twenty-eight days after notice of the deposit of the said valuation list in compliance with s. 18 of the Union Assessment Committee Act, 1862, and s. 1 of the Union Assessment Committee Amendment Act, 1864, and that such notice was a condition precedent to the hearing of the appeal. The recorder upheld this preliminary objection and dismissed the appeal with costs.

The valuation lists in force in the parish when the said rate was made had been deposited by the overseers and approved by the assessment committee in the year 1910, and on May 30, 1911, the waterworks company gave notice of objection to the said lists, on the ground of unfairness or incorrectness in the valuation of the properties of the guardians, to the assessment committee, to the overseers, and to the said guardians, and failed to obtain relief from the assessment committee, who held that they had no power to alter or amend the lists as the notice of objection had not been given to the guardians within twenty-eight days after the deposit.

At the time when the Act of 1864 came into operation a rate-payer was entitled to appeal to quarter sessions against a rate made at any time after the deposit and approval of a valuation list, without having objected in any manner to the valuation list itself. This right is recognized by s. 22 of the Act of 1862. The Act of 1864 imposed two conditions on the exercise of this right of appeal—(1.) that notice of such appeal should be given to the assessment committee, who then became entitled to appear as respondents, and (2.) that notice of objection against the valuation list shall have been given to the assessment committee where the rate has been made in conformity with the list, upon which objection the appellant has failed to obtain relief, and it provided that the assessment committee shall hear the objection after notice given at any time, although the list has been approved, and, if they amend the list on such objection, that they shall give notice of the amendment to the overseers.

In my opinion s. 1 of the Act of 1864 should be read as an amendment only of s. 22 of the Act of 1862, as was decided in *Reg. v. Edmonds* (1), and that, while imposing the new conditions of appeal, it is intended to preserve the existing right of appeal against any rate made at any time after the list has been approved under s. 18 of the Act of 1862. The right to object to the valuation list under s. 18 of the Act of 1862 before it is approved by the assessment committee, and under the conditions prescribed by that section, still remains as it was before the Act of 1864, and the only question in my opinion in this case is whether the notice of objection required by s. 1 of the Act of 1864, which may be given at any time, is a notice to the assessment committee only, or whether it comprehends notices also to the overseers and to the third party whose assessment is objected to, as in the present case. Having regard to the provision for notice of any amendment to be given to the overseers, which seems to contemplate that they may not be present, and to the provisions of s. 19 of the Act of 1862, which empowers the assessment committee to direct notice of the objection to be given to third parties, it may be that notice to the assessment committee alone is sufficient under the Act of

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1864, but in any case, if this is not the correct view, I think notice may be given to the other parties at any time that it is given to the assessment committee and that the limit of twenty-eight days in s. 18 of the Act of 1862 is not incorporated in s. 1 of the Act of 1864. I think the words, "in the manner prescribed," in the later Act refer to s. 42 of the Act of 1862, as was decided in *Reg. v. Langriville*. (1) I do not think the decisions in *Reg. v. Langriville* (1) and *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (2), which were cited in support of the respondents' contention, conflict with the view I have expressed of the Act of 1864. The case of *Reg. v. Langriville* (1) rather supports it, and the case of *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (2) only decides that the assessment committee cannot legally approve the valuation list under the Act of 1862 before the expiration of twenty-eight days after the deposit; and the right of objection to the list, of which the respondents had been deprived, mentioned in the judgment in that case had reference only in my opinion to an objection under the Act of 1862 before the list was approved.

For these reasons I think that the mandamus should go to the recorder to hear the case.

The following judgment of PICKFORD J. was read by

RIDLEY J. In this case the appellants appealed to quarter sessions against a rate made in conformity with a valuation list approved by the assessment committee on the ground that other hereditaments in the same parish were under-assessed. The question is whether they were entitled so to appeal without having given to the occupiers of those hereditaments and to the overseers a notice of objection within twenty-eight days of the publication of the list in conformity with s. 18 of the Union Assessment Committee Act, 1862.

The answer depends upon the proper construction to be put upon this section and s. 1 of the Union Assessment Committee Amendment Act, 1864.

By the Act of 1862 the assessment committee was first established, and if any objection was taken to the valuation list

(1) 14 Q. B. D. 83.

(2) [1894] 1 Q. B. 411.

deposited by them it was necessary for the objector to give notice to three persons or bodies: (1.) the committee; (2.) the overseers; (3.) the occupier of other hereditaments if his objection was to their being under-assessed. Such notices had to be given within twenty-eight days of the notice of the depositing of the list. Any person could, however, appeal to quarter sessions against the rate without making any objection to the approval of the list by the committee. After the approval of the list no objection could be taken before the committee. The first section of the Act of 1864 is as follows: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such, relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly." This Act altered the law in several respects, it allowed the assessment committee to appear on the appeal to quarter sessions in support of the valuation list, it allowed objections to be made to the list after it was approved, and it prohibited any appeal to quarter sessions against the rate unless an objection had been made to the list before the committee. In my opinion, whatever may be the meaning of the words "notice having been given at any time," the notice there mentioned is the only notice which is a condition

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precedent to the hearing of the objection by the assessment committee, for the section provides that on that notice being given the committee shall hear the objection. If the words refer only to the notice to be given to the assessment committee, then the notices to the overseers and the third party are not conditions precedent to the hearing of the objection, and although at first sight this might seem to be an unlikely construction, as it does not require notice to be given to parties who might be affected by the decision, this may be met by the provisions of s. 19 of the Act of 1862, which empowers the committee to direct notice of the objection to be given to parties who may be affected by it.

If on the other hand it is meant by the words "notice to" to include notice to all persons entitled to be heard before the committee, namely, the persons mentioned in s. 18 of the Act of 1862, then this notice has been given. These were the two constructions contended for by the parties before us, and whichever be adopted it seems to me that the notice required by the first section of the Act of 1864 has been given, and that as the appellants had given that notice and failed to obtain relief from the committee they are entitled to ask that the appeal should be heard and that the mandamus should go. It was, however contended that the cases of *Reg. v. Langriville* (1) and *Reigate Union Assessment Committee v. South Eastern Ry. Co.* (2) are authorities against this conclusion, and that they decide that notices to the overseers and the third party must still be given within twenty-eight days of the deposit of the list as a condition precedent to appeal. Neither of these cases actually decided the point, but it is said that the reasoning on which they were founded established that conclusion. I do not think that is correct; the former case merely decided that the words "notice having been given" &c. only apply to a notice that is given to the committee and not to a notice to be given by them, and although it is said that notice must not be read as notices, I do not think this point was in any way before the Court. If the first construction mentioned above of these words be the correct one, this case in no way conflicts with my conclusion.

In the latter case the point decided was that the committee

(1) 14 Q. B. D. 83.

(2) [1894] 1 Q. B. 411.

must not approve the valuation list before the expiration of twenty-eight days, and there seems no reason for saying that s. 1 of the Act of 1864 in any way repealed the provision as to approval in the Act of 1862. The Court, however, gave as one ground of their decision the opinion that an earlier approval would deprive the objector of a right to object to the approval within twenty-eight days. There does not seem to be anything to prevent his objecting still to the list before approval, and in that case he must object within twenty-eight days, but the Court were not considering his right of appeal to quarter sessions, and it seems to me that although he must object within twenty-eight days if he wishes to obtain an alteration in the list before approval, that does not prevent his appealing to quarter sessions if he has given a notice under s. 1 of the Act of 1864. These cases do not therefore seem to me to be really in conflict with the conclusion at which I have arrived.

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 BRISTOL
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Ex parte.
 ———
 Pickford J.

Rule absolute.

Solicitors for appellants: *Woodcock, Ryland & Parker, for E. Gerrish, Harris & Co., Bristol.*

Solicitors for respondents the overseers: *Robins & Co., for E. J. Taylor, Town Clerk, Bristol.*

Solicitors for respondents the guardians: *Meredith & Co., for Osborne, Ward, Vassall & Co., Bristol.*

J. E. A.

1912

Dec. 18, 19,
20.LOFTHOUSE COLLIERY, LIMITED *v.* OGDEN.

Practice—Coal Mines (Minimum Wage) Act, 1912—Ambiguous Award—Declaratory Judgment as to Meaning of—Jurisdiction of Court—Order XXV., r. 5.

Where a joint district board under s. 2 of the Coal Mines (Minimum Wage) Act, 1912, make an award settling the minimum rates of wages in their district, and the award is expressed in ambiguous terms, although there is no right of appeal from the award, the High Court has jurisdiction under Order XXV., r. 5, to determine what it means, and declare the rights of the parties under it accordingly.

TRIAL of action before Bailhache J. without a jury.

By s. 2 of the Coal Mines (Minimum Wage) Act, 1912 (2 & 3 Geo. 5, c. 2), minimum rates of wages are to be settled separately for each of the districts named in the schedule to that Act by a body of persons consisting of representatives of employers and workmen and recognized by the Board of Trade as the joint district board of the district. Among the districts named in the schedule is the West Yorkshire district. Under s. 2, sub-s. 5, the joint district board for the said district has, for the purpose of settling minimum rates of wage, power to subdivide their district into two or more parts. The members of the said board having failed to agree upon the sub-division, an award was made on May 9, 1912, under s. 4, sub-s. 2, by Judge Amphlett, the chairman of the said board, whereby the said district was subdivided into two parts, to be known as the eastern sub-division and the western sub-division. As defined in the award "The eastern sub-division is to include all pits situate on the east of the Great Northern Railway Company's main line from Leeds The western sub-division is to include all pits situate on the west of the Great Northern Railway Company's main line." As appeared from the award the minimum rates of wages payable in the eastern sub-division were fixed considerably higher than those payable in the western sub-division. The mines on the west side of the railway were generally of shallow seams and the working expenses thereof greater than in the mines on the east side of the railway where the seams were thicker. The plaintiffs owned and worked a mine

known as the Lofthouse Colliery situate in the West Yorkshire district. In that mine the greater part of the workings were on the western side of the railway, while the two shafts by which the mine was worked were situate on the eastern side of the line. The defendant was a miner in the employ of the plaintiffs and was also president of the local branch of the miners' trade union. He claimed on behalf of himself and all other workmen in the plaintiffs' employ in the mine that the mine was situate in the eastern sub-division of the district and that the workmen therein were entitled to the minimum rates of pay applicable in the eastern sub-division. The plaintiffs contended that on the true construction of the award the mine was situate in the western sub-division. The dispute turned upon the sense in which the chairman used the word "pits" in his award. The action was brought for a declaration that the plaintiffs' mine was situate in the western sub-division. The defendant contended further that the Court had no jurisdiction to adjudicate upon the matters in dispute.

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Danckwerts, K.C., and *Latter*, for the plaintiffs. The case comes before the Court not by way of appeal from the chairman, but for the purpose of asking the Court to put a construction upon the language used by him. The Court has power under Order xxv., r. 5 (1), to make a declaration as to the rights of the parties under the chairman's order, although it cannot give any relief if it thinks that the construction which it feels compelled to put upon it is wrong. There are numerous cases in which such declarations have been made: *Société Maritime et Commerciale v. Venus Steam Shipping Co.*(2); *Burghes v. Attorney-General*(3); *Dyson v. Attorney-General*.(4) There is nothing in the Coal Mines (Minimum Wage) Act, 1912, to lead to the conclusion that there was any intention to oust the jurisdiction of the Court in this respect.

Sankey, K.C., and *Waddy*, for the defendant. The Court has

(1) By Order xxv., r. 5, of the Rules of the Supreme Court, "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may

make binding declarations of right whether any consequential relief is or could be claimed, or not."

(2) (1904) 9 Com. Cas. 289.

(3) [1911] 2 Ch. 139.

(4) [1912] 1 Ch. 158.

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no jurisdiction to hear the case. There is no right of appeal from the award, and the chairman of the joint district board alone has jurisdiction to say what his award means.

BAILHACHE J. This case arises under the Coal Mines (Minimum Wage) Act, 1912, under the following circumstances :— The joint district board for West Yorkshire constituted under the Act were empowered by sub-s. 5 of s. 2 of the Act to sub-divide West Yorkshire into two or more districts if desirable for the purpose of settling minimum rates of wages. The masters and men upon the board were unable to agree as to the division, and Judge Amphlett, the chairman of the board, divided the district into two parts, fixing the Great Northern Railway main line to Leeds as the line of division. This he did by what for want of a better word I call his award dated May 9, 1912. By this award the eastern sub-division was to include all pits situate on the east of the Great Northern Railway, as therein described, and the western sub-division was to include all pits situate on the west of the same railway, as similarly described, and by the same part of his award minimum rates of wages were fixed for each sub-division. The plaintiffs claim that their collieries are in the western and the defendant claims that they are in the eastern sub-division. The matter is important because the rates of wages applicable to the western sub-division are lower than those applicable to the eastern sub-division. Upon the case being opened I was very doubtful about the competence of the Court to entertain the action, and those doubts have not been entirely removed ; but upon the whole I have come to the conclusion that under Order xxv., r. 5, it is competent for me to put a construction upon the learned chairman's award to the extent of declaring the rights of the parties under that award. I must of course be careful not to express any opinion as to the correctness of such award, or in any way to alter or vary it. In my view, in matters within their powers under the Act the decision of the joint district board, or of the chairman where there was disagreement, is not open to review unless, possibly, where irregularity or misconduct is alleged and proved. I need hardly say no question of that sort arises here.

[The learned judge then proceeded to deal with the question of the meaning of the word "pits" as used in the chairman's award, and came to the conclusion that it meant the shafts coupled with the underground workings to which access was had from the shafts and whether such workings lay on one side of the railway line or the other. He accordingly held that the plaintiffs' collieries were in the eastern sub-division.]

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Bailhache J.

Judgment for defendant.

Solicitors for plaintiffs: *Simpson, Thomas & Clark, for Simpson, Thomas & Curtis, Leeds.*

Solicitors for defendant: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

J. F. C.

RYALL v. KIDWELL & SON.

1913

May 1.

Landlord and Tenant—House, let for Habitation—Defective Premises—Undertaking to keep fit for Human Habitation—Accident arising from Defect—Personal Injury to Daughter of Tenant—Housing, Town Planning, &c. Act, 1909 (9 Edw. 7, c. 44), ss. 14, 15.

By s. 14 of the Housing, Town Planning, &c., Act, 1909, in any contract made for letting for habitation a house to which the Act applies there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation.

By s. 15, sub-s. 1, s. 14 shall, where applicable, take effect as if the condition implied in that section included an undertaking that the house shall during the holding be kept by the landlord in all respects reasonably fit for human habitation. By sub-ss. 3, 4, and 5, if it appears to the local authority that the implied undertaking is not complied with, the local authority may require the landlord to execute such works as they shall specify as necessary. The landlord may thereupon close the house for human habitation; otherwise the authority may do the necessary work and recover the expense from the landlord as therein provided. By sub-s. 6 the landlord may appeal to the Local Government Board. By sub-s. 9 any remedy given by the section for non-compliance with the undertaking implied by virtue of the section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord either at common law or otherwise:—

Held, that the effect of these enactments is to import into the contract of tenancy an implied undertaking by the landlord towards the tenant

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alone that the demised premises shall be during the holding in all respects reasonably fit for human habitation, and that a stranger to the contract of tenancy has no remedy for a breach of this implied undertaking.

Cavalier v. Pope [1905] 2 K. B. 757; [1906] A. C. 428, applied.

APPEAL from the county court of Kent holden at Rochester.

The plaintiff, Frances Alice Ryall, an infant, by Henry Charles Ryall, mason, her father and next friend, sued the defendants to recover damages for personal injuries sustained by her on October 31, 1912, owing to the alleged negligence of the defendants in allowing the floor of a bedroom in a house known as 35, Britton Street, Gillingham, to be in a defective and dangerous condition.

Henry Charles Ryall was tenant and the defendants were landlords of the house in question, which was let by the defendants to the said Henry Charles Ryall at a weekly rent of five shillings. On October 31, 1912, the plaintiff who had been standing on a window-sill cleaning windows, stepped from the window-sill on to a chair. One leg of the chair slipped into a hole in the floor. The plaintiff fell and sustained the injuries complained of.

The county court judge gave judgment for the defendants.

The plaintiff appealed.

C. T. Williams, for the appellant. The house in question is one to which ss. 14 and 15 of the Housing, Town Planning, &c., Act, 1909 (1), apply. Those sections are an extension of the provisions of s. 75 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). The county court judge held that the present case was covered by the principle of *Cavalier v. Pope* (2), where it was decided that in an ordinary case of landlord and tenant a breach by the landlord of an agreement to repair the demised premises gave no cause of action to the tenant's wife who suffered injury through the breach. But from the decision in that case *Collins M.R.* at the end of his judgment (3) expressly excluded cases to which the Housing of the Working Classes

(1) See note on p. 128, post.

in *H. L.* [1906] A. C. 428.

(2) [1905] 2 K. B. 757; affirmed

(3) [1905] 2 K. B. at p. 764.

Act, 1890, might apply. The point left undecided in *Cavalier v. Pope* (1) now comes for decision. It cannot be doubted that this statute was passed for the benefit of the working classes, and that not only the workman himself but his wife and children are within the benefit of the Act. When a statute imposes a duty for the benefit of a class, then, unless there is some indication to the contrary, any member of the class may sue who is injured by a breach of the duty. If a special penalty is imposed for breach of the duty, that is an indication to the contrary; but by s. 15, sub-s. 9, of the Act in question the remedies provided for breach of the landlord's undertaking are to be in addition to and not in derogation of any other remedy available to the tenant against the landlord. Therefore the special remedy is no indication that the general law, giving a remedy to each member of a class for breach of a duty imposed for the benefit of the class, is not to apply: *Dawson & Co. v. Bingley Urban Council*. (2)

[AVORY J. This statute seems to add to the contract of tenancy a term which by the law of Scotland is implied already in the case of urban houses: *Cameron v. Young*. (3)]

The effect of the Act is wider than that; it introduces the local authority and in certain events the Local Government Board into the discussion, and thereby gives a public aspect to the duty imposed upon the landlord.

A. H. Richardson, for the respondents, was not heard.

RIDLEY J. In my opinion the county court judge was right, and this appeal must be dismissed. The case of *Cavalier v. Pope* (4) decides that an action upon a promise by a landlord to a tenant to repair demised premises can only be brought by the tenant. In that case the wife of the tenant was injured, but it was held that, being a stranger to the contract, she had no claim for damages against the landlord.

In the present case it was argued that the Housing, Town Planning, &c., Act, 1909, has altered the law as laid down in *Cavalier v. Pope* (4), and has enabled persons who are not parties

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(1) [1905] 2 K. B. 757; [1906] A. C. 428. (3) (1907) 9 F. 475; [1908] A. C. 176.

(2) [1911] 2 K. B. 149.

(4) [1906] A. C. 428.

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Ridley J.

to the contract to maintain an action for damages if they sustain injuries through the demised premises being out of repair. Sect. 14 of that Act provides that in any contract for letting for habitation a house such as the house in question, there shall be implied a condition that the house is at the commencement of the letting in all respects reasonably fit for human habitation. That means that there is to be implied as between landlord and tenant a condition that the house is at the commencement of the letting fit for human habitation. It is impossible to read the section in any other sense. Then s. 15, sub-s. 1, provides that the foregoing section shall take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation. The utmost effect of that section is to extend through the continuance of the tenancy the undertaking or condition imposed upon the landlord at the commencement of the tenancy. That is still an undertaking as between landlord and tenant. The section does not impose upon the landlord any liability towards strangers to the contract of tenancy. Very different words from those in ss. 14 and 15 of the Act would have been used if the Legislature had intended to impose upon a landlord a liability for breach of the Act towards any one who came upon the premises. So far from this being the intention a strong indication to the contrary appears from sub-s. 9 of s. 15, which provides that any remedy given by the section for non-compliance with the undertaking implied by virtue of the section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord, either at common law or otherwise. In my view this case differs widely in principle from the case of *Dawson & Co. v. Bingley Urban Council* (1) and from all cases of that class where a statutory duty is imposed upon an individual for the benefit of the public at large, and where the non-performance of the duty gives rise to a grievance in the nature of a public nuisance. In the present case the rights and liabilities conferred and imposed are merely between landlord and tenant. For these reasons I think the appeal must be dismissed.

(1) [1911] 2 K. B. 149.

AVORY J. I am of the same opinion. The effect of s. 15 of the Act is that into this contract of letting between landlord and tenant there is imported a term that the premises shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation. If there were any room for doubt that this imports a contract between landlord and tenant only, that doubt would be removed by sub-s. 9, which provides that "any remedy given by this section for non-compliance with the undertaking implied by virtue of this section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord, either at common law or otherwise." Then, this being a contract between landlord and tenant, the question is whether the daughter of the tenant has any right of action against the landlord for breach of the contract. The Court of Appeal and the House of Lords in the case of *Cavalier v. Pope* (1) have expressly decided that she has not. In that case there was a special contract between landlord and tenant. The circumstances were precisely similar to those in the present case except that the injured person in that case was the wife, while in the present case she was the daughter, of the tenant. There can be no difference between a contract made by the parties themselves and a contract made for the parties by the Legislature. Mr. Williams contended that although there might be no remedy on the contract there was a remedy in tort. But that very point was dealt with by the Court of Appeal and the House of Lords in *Cavalier v. Pope*. (1) The history of the litigation in that case was that Phillimore J. in the first instance had given judgment in favour of the wife of the tenant not on any contract but in tort. In the Court of Appeal it was argued in support of the judgment that there was a right of action in tort based upon the landlord's knowledge that the wife would use the house and his consequent duty towards her in addition to his contractual duty towards her husband. The Court of Appeal held that this argument could not be sustained. The House of Lords affirmed this decision. Therefore that case is an authority directly in point that a person who is not the tenant has no right of action either in contract or in tort. In my opinion the present case is

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concluded by that authority. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant : *O. L. Richardson.*

Solicitors for respondents : *Hair & Co.*

NOTE.—Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), s. 14 :
“ In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding—

“(a) in the case of a house situate in the administrative county of London, forty pounds ;

“(b) in the case of a house situate in a borough or urban district with a population according to the last census for the time being of fifty thousand or upwards, twenty-six pounds ;

“(c) in the case of a house situate elsewhere, sixteen pounds ;
there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation, but the condition aforesaid shall not be implied when a house or part of a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term.”

Sect. 15 : “(1.) The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation.

“(2.) The landlord or the local authority, or any person authorized by him or them in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any house, premises, or building to which this section applies for the purpose of viewing the state and condition thereof.

“(3.) If it appears to the local authority . . . that the undertaking implied by virtue of this section is not complied with in the case of any house to which it applies, the authority shall, if a closing order is not made with respect to the house, by written notice require the landlord, within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as the authority shall specify in the notice as being necessary to make the house in all respects reasonably fit for human habitation.

“(4.) Within twenty-one days after the receipt of such notice the landlord may by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house.

“(5.) If the notice given by the local authority is not complied with, and if the landlord has not given the notice mentioned in the immediately

preceding sub-section, the authority may, at the expiration of the time specified in the notice given by them to the landlord, do the work required to be done and recover the expenses incurred by them in so doing from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts, or, if they think fit, the authority may by order declare any such expenses to be payable by annual instalments within a period not exceeding that of the interest of the landlord in the house, nor in any case five years, with interest at a rate not exceeding five pounds per cent. per annum, until the whole amount is paid, and any such instalments or interest or any part thereof may be recovered from the landlord as a civil debt in manner provided by the Summary Jurisdiction Acts.

“(6.) A landlord may appeal to the Local Government Board against any notice requiring him to execute works under this section, and against any demand for the recovery of expenses from him under this section or order made with respect to those expenses under this section by the authority, by giving notice of appeal to the Board within twenty-one days after the notice is received, or the demand or order is made, as the case may be

“(9.) Any remedy given by this section for non-compliance with the undertaking implied by virtue of this section shall be in addition to and not in derogation of any other remedy available to the tenant against the landlord, either at common law or otherwise.”

W. H. G.

[IN THE COURT OF APPEAL.]

REITH *v.* GOVERNING BODY OF WESTMINSTER
SCHOOL.

C. A.

1913

April 22, 23.

Revenue—House Duty—School Buildings—“Offices belonging to and occupied with any dwelling-house”—House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 2.

The school buildings of a public school, which was not a charity school, consisted of a residential building in which the foundation scholars resided and which was used exclusively by them, and a building, structurally disconnected from it, containing a school room, class rooms, library, &c., which were used by all the boys attending the school, foundationers and non-foundationers alike. Both buildings were in the occupation of the governing body of the school. A number of the non-foundationers resided in certain masters' boarding-houses in the school precincts, which houses were in the occupation of the respective house-masters by whom they were kept:—

Held, that, for the purposes of the assessment to inhabited house duty of the building in which the foundationers resided, the school room and class rooms ought to be included in the valuation as being “offices

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belonging to and occupied with" the building to be assessed within the meaning of r. 2 of Sched. B to the House Tax Act, 1808, and none the less so because they were also used for the non-foundationers resident in the masters' boarding-houses.

Decision of Horridge J. [1913] 1 K. B. 190, on this point, reversed.

APPEAL by the Crown from a decision of Horridge J. (1) that, for the purposes of the assessment of the Governing Body of Westminster School to inhabited house duty in respect of the school buildings, the buildings denoted on the plan as B, comprising Ashburnham House, class rooms, &c., and the buildings denoted as D, comprising the large school room, ought not to be included in the valuation as being "offices belonging to and occupied with" the "dwelling-house" which consisted of the buildings denoted as A and C, comprising respectively the sanatorium and college, within r. 2 of Sched. B to the House Tax Act, 1808. Horridge J. also decided that Westminster School was not a "charity school" within the meaning of case 4 of the Exemptions in Sched. B of the House Tax Act, 1808, but from that decision there was no appeal.

The facts proved or admitted are fully stated in the report of the hearing of the case before Horridge J. (1), and the following statement of the facts is sufficient for the purposes of this report.

The school buildings, the assessment of which was disputed, are situate on the east and north sides of Little Deans Yard; the block of buildings consisting of the sanatorium (hereinafter referred to as A) and college (hereinafter referred to as C) occupies the southern portion of the east side of the yard, and the block of buildings consisting of the class rooms, carpenter's shop, &c. (hereinafter referred to as B), and the large school room known as "Up School" (hereinafter referred to as D) occupies the northern portion of the east side and the whole of the north side of the yard. Little Deans Yard is not the property of the governing body of the school, but is vested in the Dean and Chapter of Westminster; it is one of the means of approach to the cloisters and the canons' houses therein, as well as being the usual approach to the school buildings; it is not a public thoroughfare, but is private property, and with

Deans Yard is closed once a year. There is no internal communication between the block of buildings and C on the one hand and the block B and D on the other. C is the college building proper, and A consists of the sanatorium, matron's quarters, and kitchen. C is a two-storeyed building, the dormitory being on the first floor, with accommodation for forty King's scholars who sleep there, and on the ground floor are studies for the boys, a prayer room, lumber room, and lavatories. The part of A known as the sanatorium consists of nine rooms, which are on the second and third floors. On the first floor of A are the matron's quarters (consisting of three rooms), linen room and cupboards, and there is a kitchen on the ground floor. No tuition is given in any part of A or C. There is complete internal communication throughout the whole of A and C respectively, and C communicates internally with A, but the two portions are architecturally distinct, the college building having been erected about the year 1720, and the main part of A having been built about the year 1847, and the upper storey having been added in the year 1902. The only means of getting from A and C to B and D is by crossing a portion of Little Deans Yard. Between the different portions of the block B and D there is internal communication throughout. D is now used only for prayers and for general assemblies of the boys. B in addition to the class rooms contains the school library, book offices, tuck shop and common rooms with lockers for the boys' use, and a carpenter's shop with lavatories behind. The part of the building A which is used as a sanatorium is in fact used only for the King's scholars, but by one of the regulations made by the Special Commissioners under the Public Schools Act, 1868, the sanatorium is available at the discretion of the headmaster to receive cases of infection from the boarding-houses. Certain day boys, not being King's scholars, who have dinner at the school, dine with the King's scholars at the college hall which is not one of the buildings the subject of this appeal. The boarding-houses above referred to are two in number and are situate on the south side of Little Deans Yard. They are in the occupation of the house-masters who keep them respectively, and not of the governing body.

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Sir John Simon, S.-G., and Finlay, for the appellant. The chief question argued in the Court below was whether Westminster School was a charity school. Horridge J. held that it was not, and there is no appeal on that point. The question remains how much of the school buildings ought to be included in the valuation for the purpose of house duty under the House Tax Act, 1808 (48 Geo. 3, c. 55), Sched. B, r. 2, re-enacted by s. 2 of the House Tax Act, 1851 (14 & 15 Vict. c. 36). By Sched. B, r. 2, of the Act of 1808 "offices . . . belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house."

The schedule speaks of duties made payable on all inhabited dwelling-houses, and the schedule to the Act of 1851 specifies the duty "for every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied." In the present case the buildings B and D ought to be included in the valuation as being offices belonging to and occupied with the dwelling-houses A and C for one combined purpose: *Young v. Douglas*. (1) The fact that there is no internal communication between them is immaterial: *Cheape v. Kinmont* (2); *Smith v. Petrie*. (3) It is of no consequence that there are two dwelling-houses, and that B and D are used for teaching day boys as well as King's scholars: *Lambton v. Kerr*. (4) In *Clifton College v. Thompson* (5) the buildings of the dwelling-house were in different occupations: *Charterhouse School v. Gayler*. (6) B and D belong to and are occupied with A and C and both qualifications are necessary: *Swain v. Fleming*. (7) There must be a connection in the purposes for which the buildings are occupied: *Browne v. Furtado*. (8) These conditions are fulfilled by B and D, and they are not within any of the exemptions specified in Sched. B.

Ryde, K.C., and Konstam, for the respondents. The authorities which have been cited stop short of the point now before the Court. The substantial user of the buildings B and D is by the day boys. Under the Public Schools Act, 1868, the

(1) (1879) 1 Tax Cases, 227, 231.

(2) (1888) 2 Tax Cases, 418.

(3) (1892) 3 Tax Cases, 155.

(4) [1895] 2 Q. B. 233.

(5) [1896] 1 Q. B. 432.

(6) [1896] 1 Q. B. 437.

(7) (1899) 4 Tax Cases, 107.

(8) [1903] 1 K. B. 723.

buildings are vested in and they are in fact occupied by the governing body. B and D are "offices" within r. 2; they are not ejusdem generis with coach-houses and stables, but form a separate class, and cannot be said to belong to or be occupied with a house unless it be for some purpose ancillary to the use made of the house. The only occupied dwelling-house is the college; and r. 2 requires that, to be taxable, B and D should belong to it alone to the exclusion of other dwelling-houses in the occupation of third parties. They must be appurtenant to the college. Rooms which are used by 270 boys cannot be said to belong to a college of forty boys. The school room and class rooms are not used for the purposes of the dwelling-house in which the King's scholars reside any more than for the purposes of the masters' houses in which the non-foundation boys reside, and the latter are not in the occupation of the governing body.

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A and C are a "charity school" within case 4 of the Exemptions, but it was contended in the Court below that they could not be severed from the rest of the building; that, taken as a whole, Westminster School was no longer a charity school; and that, following *Governors of Charterhouse School v. Lamarque* (1), the whole must be included in the valuation. But that is not so. A and C are a charity school, and the learned judge was wrong in looking at the character of the governing body and deciding this question on a consideration of the buildings as a whole. The point is that to be liable to this tax the buildings must be used solely by the occupiers.

Sir John Simon, S.-G., in reply. On principle and on the authorities the appellant is right. On principle, because the buildings B and D must be taken as associated with A and C; and on authority, because if in *Clifton College v. Thompson* (2) the Court could have held that the college was in occupation of the headmaster's house, then the college would have been assessed in respect of that, and also, now, by virtue of the decision of this Court in *Browne v. Furtado* (3), in respect of the adjacent buildings as well.

(1) (1890) 25 Q. B. D. 121.

(2) [1896] 1 Q. B. 432.

(3) [1903] 1 K. B. 723.

C. A. COZENS-HARDY M.R. This is an appeal from the decision of
1913 Horridge J., who has held that the governing body of West-
minster School are not liable to pay inhabited house duty in
REITH respect of certain portions of the buildings of the school which
v. on the plan before us are indicated by letters B and D. The
GOVERNING BODY OF plan really is so clear that I do not know that many words are
WEST- necessary to explain it. It is admitted that A and C form an
MINSTER inhabited house. It is a house occupied by the governing body
SCHOOL. where King's scholars sleep, and the only question that is before
us, it being admitted that inhabited house duty is payable in
respect of that house, is whether, to use the language of the Act,
the other buildings in question, B and D, can be said to "belong
to and to be occupied with" the dwelling-house called A and C.
How are they occupied and used? In this way: They are used
by the King's scholars as school rooms. You cannot get to them
without going into Little Deans Yard; but they are school rooms,
and consist of the Upper School, Ashburnham House, and various
other rooms, suitable for the purposes of the school. If this
great Westminster School were limited now simply to King's
scholars sleeping in A and C, I do not think it would admit of
a reasonable doubt that all these premises denominated B and
D would be said to belong to and to be occupied with A and C.
Now does it make any difference that at Westminster School
there are other boys, not being King's scholars, some of whom
reside in houses which are masters' houses not in the occupation
of the governing body, but of the masters themselves, and that
they also use the school rooms as well as the King's scholars?
And further, does it make any difference that there are boys
whom I will call, not very accurately, town boys—boys who do
not in any way reside in the school, but come to the school through
Deans Yard and through the entrance there, and make use of the
school rooms in B and D, together with the King's scholars? I
am unable to see that these buildings, which are plainly within
the language of the Act so far as the King's scholars are con-
cerned, are any the less within it because other boys use the
same buildings for the same purposes. The learned judge below
said: "It seems to me that these rooms were 'occupied with'
A and C, and this fact was not disputed on behalf of the

respondents, but it was said that they were not 'belonging to the premises A and C. There are, as appears by the plan, masters' houses numbered 1 and 2, and the boys from these houses together with the others, making a total of 230, all use these buildings as well as the forty King's scholars from A and C. No authority in my view bearing on the point was cited to me, and on the best consideration I can give to the facts I cannot see why these buildings should belong to A and C any more than to either of the houses, and I am of opinion that they cannot in any sense be said to belong to A and C." In my opinion they plainly belong none the less because other boys use them for the same purpose as the King's scholars residing in A and C. It is, I think, true to say that there is no express authority covering precisely this point; but, speaking for myself, I cannot doubt that one of the cases which has been referred to, namely, *Lambton v. Kerr* (1), has an important bearing upon it. That is the case of the racing stables. There there was a dwelling-house with domestic offices, and gardens of about half an acre on the east side of the dwelling-house, which were used entirely as a training and exercising yard, and which communicated with the dwelling-house by two gateways and stables and saddle rooms. It was held that they all belonged to and were occupied with the dwelling-house, and therefore inhabited house duty was payable on the whole. I ask myself, would it have made any difference whatever to the decision in that case if Mr. Lambton, the trainer, had allowed some other person's horses to come and to use the half acre of ground which was used simply as a training and exercise ground? It seems to me on principle that the conclusion must follow that it would have made no difference to the decision. Therefore, with great respect to Horridge J., I am unable to accede to the view which he takes. I hold that B and D are none the less used with A and C because they are also, with the permission of the governors, used by boys residing in the masters' houses and also by the town boys. In my opinion the appeal must be allowed with the usual consequences.

BUCKLEY L.J. The question for decision is whether the premises B and D are "offices" belonging to and occupied

(1) [1895] 2 Q. B. 233.

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with the premises A and C. The premises A and C are the dormitories and dwelling rooms of the boys; B and D are the school rooms and class rooms. The governing body of Westminster School occupy A and C by the forty King's scholars who reside there. The governing body occupy the premises B and D by the whole 270 boys whom they allow to assemble there for the purpose of education—that is to say, they occupy the latter premises by the forty King's scholars and the 230 other scholars. The governing body occupy both premises, there is a common occupier. That disposes of the words “occupied with.”

Then I have to consider the words “belonging to.” The words “belonging to” *prima facie* import ownership, but in the context, belonging to other premises, they cannot import ownership. The words must mean that for the purpose of user the offices are appropriated to or used for the other premises. The question for determination, therefore, is whether B and D are appropriated to or used for the premises A and C; if so, they are premises belonging to A and C. Now B and D belong to A and C in the sense that they are used for the school business, if I may so call it—the education of the scholars who reside in A and C. They are an appendage of the buildings, A and C, as being used for the purposes of those who under the governing body are occupying A and C. This is none the less true because they are also used for the 230 other boys. It is not a true proposition that premises are not used for one purpose because they are also used for another. They may be used for both, and that is what happens here. B and D are used for the purposes of A and C, and are used for other purposes also.

It is to be noticed that the words in the Act are not “belonging solely to.” The offices therefore need not be used solely for the dwelling-house. What has to be ascertained is whether the offices are used for the purpose of the dwelling-house. I might put many illustrations,—suppose, for instance, a man has in connection with his dwelling-house a couple of tennis courts or a racket court or something to which other people will be glad to have access, and uses it for the purposes of his house; he and

his family or children, or, if it be a hotel, his guests, use it. If it is so used, is it any the less used for the purpose of the house because outsiders are allowed to come in paying perhaps a subscription and using the courts? To my mind no. It is still used for the house and none the less because it is used also for others. Premises B and D therefore satisfy both requirements, they belong to and they are occupied with A and C.

The only other question is whether B and D are "offices" within the meaning of this rule. As to that something has been said, but I think the point is not open to this Court after the decision in *Browne v. Furtado*. (1) If this case were taken further, the question would no doubt be open to be argued; it is not open here. Under these circumstances it seems to me that this appeal must be allowed.

KENNEDY L.J. I am of the same opinion. *Browne v. Furtado* (1), as has been said by Buckley L.J., disposes of the question as to the nature of the property or building in this case falling within the term "offices." The only other question is as to whether the fact of these premises B and D being used as part of Westminster School partly by boys who do not inhabit A and C—that is to say, by town boys, who are resident in their own houses or in lodgings, and boys who occupy the masters' houses—creates a state of things which is not covered by the legislation which gives the right to taxation.

I cannot bring myself to think that that fact is relevant when you once find that the word "belonging"—I must say a vague word of itself—has been construed in more cases than one in a sense which shews that these B and D premises could be taken as belonging to A and C. These masters' houses to which reference has been made contain boys who are not scholars, and also some of twenty additional scholars who, I believe, within the last fifteen or twenty years, though I do not think it is formally stated, were added to the original number of forty scholars. It seems to me that the fact, as has been already said by the other members of this Court, that other boys besides those residing in A and C are by the consent of the school, either in ancient or

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C. A. in modern times, given a right of access to or user of B and D,
1913 cannot destroy the connection which exists between A and C and
REITH B and D. As has been also pointed out, the language of the
v. statute is not "belonging only" but "belonging," and essentially
GOVERNING I think, when considering a word like "belonging" and looking
BODY OF to the ordinary meaning of words, one would say *prima facie* that
WEST- the class rooms of B and D belong to and form part of that which
MINSTER is the building occupied by the scholars on the foundation
SCHOOL. which forms, under the governing body, the School of West-
minster.

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I think myself that the last argument addressed to us by the Solicitor-General is well founded—that if in that case we could have found that the headmaster's house could properly be treated as being in the occupation of the college, and if we could have also found, as is now decided by *Browne v. Furtado* (1), that the adjacent buildings were "offices" within the meaning of the statute, we should have assented to the argument that they were assessable.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitor for respondents: *H. B. Willett.*

(1) [1903] 1 K. B. 723.

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May 24, 30.

[1912 W. 1769.]

Master and Servant—Compensation—Workman also carrying on Occupation of Farmer—Injury to Workman caused by Negligence of Third Party—Recovery by Workman of Compensation from Employer—Whether Damages recoverable by Workman in Capacity of Farmer from Third Party—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6.

By s. 6 of the Workmen's Compensation Act, 1906, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

"(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation."

A workman employed by a colliery company also carried on the occupation of farming a small farm. Whilst acting in his employment by the colliery company he was injured by the negligence of the servants of the defendants, the London and North Western Railway Company, in shunting a train. He made a claim for compensation from the colliery company and received from it thirty-four weekly payments knowing and appreciating that he was receiving compensation under the Workmen's Compensation Act, 1906. He subsequently brought an action against the defendants to recover damages for the injuries caused by the negligence of the defendants' servants. At the trial the jury gave a verdict for the plaintiff for 275*l.* as damages, of which amount they found that 100*l.* was in respect of the damages which he had suffered as a farmer. For the purposes of the case it was assumed that his earnings as a farmer could not be included in his claim for compensation from his employers:—

Held, (1.) that in the circumstances the plaintiff had "recovered" compensation from his employers under the Act of 1906; (2.) that having recovered compensation from his employers he was not entitled to recover the 100*l.* damages from the defendants.

FURTHER hearing in London of an action tried at the Manchester Winter Assizes before Rowlatt J. and a special jury.

The action was brought by the plaintiff, Thomas Woodcock, against the defendants to recover damages for injuries to the plaintiff caused by the negligence of the defendants' servants.

The plaintiff at all material times had two different occupations. He was employed as a waggoner, colliery shunter, and brakesman

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by the Blainscough Colliery Company, Limited, at Coppull, near Chorley, in the county of Lancaster, his wages being at the rate of 24s. 6d. a week, and he spent the rest of his working hours in farming a small farm at Livesey House Farm, Coppull.

On February 14, 1912, the plaintiff as such waggoner, colliery shunter, and brakesman was working on the siding of the colliery company which connected the colliery with the railway line of the defendants at Coppull, and thereupon the defendants by their servants so negligently and unskilfully conducted the shunting of a train of some sixty empty waggons or thereabouts into and along the siding that the plaintiff was caught and jammed between two empty and twelve loaded waggons, and sustained injuries. On March 13, 1912, the plaintiff made a claim for compensation from the colliery company and received from that company 12s. 3d. a week for thirty-four weeks or thereabouts, and the jury found that he received these sums knowing and appreciating that he was receiving compensation under the Workmen's Compensation Act, 1906.

At the trial, which took place on April 29, 1913, the jury gave a verdict for the plaintiff for 275*l.* as damages, of which amount they found that 100*l.* was in respect of the damages which he had suffered as a farmer. For the purposes of the case it was assumed on both sides that his earnings as a farmer could not be included in his claim for compensation from his employers. The questions material to this report were whether in the circumstances the plaintiff had "recovered" compensation from his employers under the Act of 1906(1); and, if so, whether he was entitled to recover the 100*l.* from the defendants.

Further arguments took place in London on May 24.

(1) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1:—

"(1.) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

"(2.) Provided that—

"(b) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either

Gordon Hewart, K.C., and Douglas Stuart, for the plaintiff.
The plaintiff is entitled to recover the 100*l.* damages in his capacity of farmer. The matter depends on the construction of s. 6 of the Workmen's Compensation Act, 1906. That section superseded s. 6 of the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), which enacted that where the injury for which compensation was payable under that Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof "the workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both." The object of that section may reasonably be said to avoid multiplicity of suits. It in effect enacted that the workman must make his choice as to which kind of proceedings he would take and that

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claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

proceed to assess such compensation"

Sect. 6: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

"(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and

"(2.) If the workman has recovered compensation under this Act, the person by whom the compensation was paid . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

"(4.) If, within the time herein-after in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose,

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he could commence only one proceeding. But that cannot be said with regard to s. 6 of the Workmen's Compensation Act, 1906, which expressly enacts that the workman may take proceedings both against the other person "to recover damages" and against "any person liable to pay compensation." But it provides against the possibility of the workman being compensated twice over in respect of the same thing by saying that he may not have compensation and damages. In the present case the injury which the plaintiff sustained qua farmer was not, so far as he was a farmer, an injury for which compensation was payable under the Act of 1906. In his capacity of a farmer he was not in the relation of a workman to any employer; he was an absolutely independent person, and he could not possibly to the extent of that damage, if it be separable from the rest, recover anything under the Workmen's Compensation Act, 1906. *Tong v. Great Northern Ry. Co.* (1) differs from the present case in two important particulars: (1.) it was a decision under the Workmen's Compensation Act, 1897, which required the plaintiff to make his option and only enabled him to commence one set of proceedings; (2.) the plaintiff in that case had only one occupation, namely, that in which he was compensated by the Act of 1897. The judgment of Cozens-Hardy M.R. in *Page v. Burtwell* (2) shews that the workman is not bound to exercise his option at the time of taking proceedings, as was the case under the Act of 1897; he may, if so minded, take proceedings concurrently, but if he recovers damages against the third party he cannot recover compensation from his employer.

The object of this section is not to prevent a workman taking duplicate proceedings. The disentitling part of the section operates at a point between the commencement of the proceedings and the conclusion. The section cannot mean that the workman may commence proceedings against his master for compensation and against the third party for damages for negligence, but, having done that, can only in the result recover one or the other. The injury for which compensation is payable under the Act of 1906 can be severed from the injury which he sustains

(1) (1902) 18 Times L. R. 566; 86 L. T. 802. (2) [1908] 2 K. B. 758.

in a wholly different capacity and for which compensation is not payable under the Act. 1913

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There is no hardship on the defendants. The Workmen's Compensation Act, 1906, does not deal with the plaintiff qua farmer. But nevertheless he was a human being who had two capacities and possibilities of loss. The defendants, whose admitted negligence caused the accident, have to compensate him; but they are not being asked to do anything twice over, and under s. 6 of the Act of 1906 he can in his two capacities recover compensation and damages: *Fowler v. Hughes*. (1)

Having regard to the decisions in *Oliver v. Nautilus Steam Shipping Co.* (2) and *Huckle v. London County Council* (3), it must be admitted that the word "recover" does not mean of necessity "recovery in an action," or "after commencing proceedings for arbitration in a county court," but it means "get," and there is a difficulty in contending if the plaintiff knew and appreciated that the money he was receiving was compensation that he did not recover it as compensation.

It is not an unreasonable construction of the words in s. 6 of the Workmen's Compensation Act, 1906, "injury for which compensation is payable under this Act" that they have no relation to an injury as to which compensation is not payable under the Act, although that injury as a physical fact is the result of an accident causing injury for which compensation is payable under the Act. The result of the opposite construction would be that the plaintiff would be disentitled from recovering in respect of an injury for which compensation is not payable under the Act. The words in s. 6, sub-s. 1, "but shall not be entitled to recover both damages and compensation" mean that he shall not be entitled to recover both damages and compensation for an injury for which compensation is payable under the Act, provided that for any injury for which compensation is not payable under the Act a workman may nevertheless recover damages.

Rigby Swift, K.C., and *Eustace Hills*, for the defendants. The decisions in *Fowler v. Hughes* (1) and *Huckle v. London County Council* (3) have no material bearing on the question before the

(1) (1903) 5 F. 394.

(2) [1903] 2 K. B. 639.

(3) (1910) 26 Times L. R. 580; 27 Times L. R. 112.

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Court. The jury have found that the plaintiff knew that he was taking money under the Workmen's Compensation Act, 1906, and upon the authorities if money has been taken under the Act, the workman knowing and appreciating that it is compensation, the compensation is "recovered" within the meaning of the Act.

The damages and compensation are payable in respect of exactly the same thing, i.e., the injury, and "injury" means physical hurt. From that physical hurt certain consequences flow, some of which are very clearly pointed out in *Tong v. Great Northern Ry. Co.* (1) There is no difference in quality between the damage which results from his having to employ separate labour as a farmer and the loss for which he is compensated under the Act of 1906. Nursing and medical expenses cannot be recoverable in a common law action when compensation has been paid under the Workmen's Compensation Act, 1906: *Tong v. Great Northern Ry. Co.* (1) [*Mahomed v. Maunsell* (2) was also referred to.]

Cur. adv. vult.

May 30. The following judgment was delivered by

ROWLATT J. In this case the plaintiff was in the employment of a colliery company and he also carried on the business of a farmer. He sued the defendants, the London and North Western Railway Company, for damages for negligence, by which he was injured in the course of his employment by the colliery company. The negligence was admitted, and the defence of the London and North Western Railway Company was that he had recovered compensation from the colliery company and that under s. 6 of the Workmen's Compensation Act, 1906, he could not also recover damages. To that it was said, first, that he had not in law recovered compensation, and, secondly, that even if he had, recovery of compensation under the Act of 1906 did not bar him from recovering damages in his position as a farmer.

The jury gave a verdict for 275*l.*, and in order that the question might be finally dealt with, they stated that 100*l.* of that sum was in respect of the damages which he had suffered as a farmer.

(1) 18 Times L. R. 566; 86 L. T. 802. (2) (1907) 1 B. W. C. C. 269.

The question is what is the position having regard to what took place from March 13, 1912, for about thirty-four weeks. The jury found that when during that period he received the sums of 12s. 3d. a week from the colliery company he knew and appreciated that he was receiving compensation under the Workmen's Compensation Act, 1906.

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In these circumstances it was very properly only faintly contended on behalf of the plaintiff that he had not recovered compensation, because, as the authorities stand, if a man puts forward a claim for compensation, or takes payments as compensation knowing that they are compensation, he "recovers" compensation within the meaning of the Workmen's Compensation Act, 1906, although no resistance is offered to the claim when it is made, and therefore no adverse or hostile step to recover compensation has been taken. That raises the real question of difficulty in this case.

On behalf of the plaintiff it was contended that, even if he had recovered compensation under the Workmen's Compensation Act, 1906, he was not barred from recovering damages so far as those damages were attributable to his position as a farmer, that is to say, which he suffered otherwise than as a workman who had benefited by the Workmen's Compensation Act, 1906. It was assumed on both sides—no doubt properly and wisely—that his profits as a farmer could not be taken into consideration in arriving at his weekly earnings for the purpose of compensation. I am not deciding in the present case—because this Act sometimes has to be construed with what I may call a certain liberality—that he could not have in some way brought in under his claim for compensation his earnings as a farmer, nor am I desirous of its being thought that I am saying that he could have done so. I am merely dealing with this case upon the footing that it was assumed by both sides that he could not have done so. It is contended on behalf of the plaintiff that, the compensation under the Act of 1906 being limited to earnings in an employment as a workman or servant, the recovery of the compensation cannot bar the right to recover damages which he suffered in a capacity outside that employment. It is clear that if he had two employments the

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recovery of compensation from one employer would bar his right to recover compensation from the other employer because the two employments have to be taken into consideration in computing the amount of the compensation recoverable from the employer who is liable to pay compensation under the Act of 1906. But it is contended that where as in the present case he has another occupation, not an employment, his right to recover damages in respect of that occupation is not taken away by his receiving compensation under the Act.

There are two sets of provisions which deal with the case of a workman who has a case founded on negligence apart from his claim as a workman. The first, which is s. 1, sub-s. 2 (*b*), deals with the case where the employer is guilty of negligence and causes an accident by it. The second deals with the case where a third person is guilty of negligence and causes an accident by it, namely, s. 6, and in that case, for the purposes of ultimate liability, the wrong-doer is put in the place of the employer, that is to say, he has to make the amount of the compensation good to the employer, from whom the workman can of course recover it. The scheme of the Act, *prima facie*, would appear to be that both those sets of provisions protecting a person who has to pay compensation from also being liable to pay damages should have the same pecuniary result. But there is a difference in language between the two sections. In the case with which s. 1, sub-s. 2 (*b*), deals, the workman has to exercise his option in commencing proceedings. He cannot commence proceedings for compensation and also for damages, but he has to exercise his option at an early stage; he cannot commence proceedings for both compensation and damages, he must make his choice; but still he is not finally concluded by taking his choice, because if he elects to sue for damages and fails, then, as he has the right defendant for compensation proceedings before the Court, he can still obtain his compensation. If, on the other hand, he claims compensation, he cannot afterwards bring an action for damages. In s. 6, which deals with the case where a third person is guilty of negligence, the language is different, owing to an alteration made in the legislation since the Workmen's Compensation

Act, 1897, because under s. 6 of the Workmen's Compensation Act, 1906, the workman need not exercise his option at the time of commencing proceedings. All that is said in s. 6 of the Act of 1906 is he cannot recover both damages and compensation. The reason for the difference between the language of s. 1, sub-s. 2 (*b*), and s. 6 is that the machinery provided for the protection of the workman by the proviso contained in s. 1, sub-s. 4, is inapplicable in the case where he is suing a person other than the employer because he has not brought the right person before the Court with regard to a claim for compensation, and having failed in his action for negligence he cannot then proceed to have the compensation assessed. The person liable to pay the compensation is not there. What he must then do is to commence other proceedings. Therefore, in order to carry out the scheme which allows him, after he has elected to sue and has in fact sued for damages and failed, to obtain his compensation, there must be different machinery, and the alternative has to be faced at a later moment in the case of a third person being negligent than where the employer is negligent. That is the reason why there is the difference in the form of s. 6.

If the workman recovers compensation from the employer, he clearly could not sue him for damages afterwards on any ground. I think that is clear, in the case of the employer, and that if the colliery company had been guilty of this negligence, the plaintiff could not have asked the colliery company both for compensation and for damages ultra. I think that was hardly disputed in argument. But it is said that is not so when a third party is the wrong-doer. That depends upon the true construction of the language of s. 6 of the Workmen's Compensation Act, 1906, and without straining the words, one must read the section in order to ascertain its meaning. The opening words are "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." The "injury" means, in my opinion, the physical injury—the hurt—not the injury which by the words of the section gives a right to a remedy, but "the

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injury caused under circumstances creating a legal liability in some person other than the employer," so that the injury may or may not be one which gives rise to damages. The whole statute deals with injuries to workmen in the sense of injuries to the body of the workman ; it is not a translation of the juristic word "injuria"—it simply means the hurt. The section then enacts that when the injury is caused in those circumstances "the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation." The damages which the workman can recover in an action for injury to his person caused by negligence fall under many well-known heads—at any rate there are three, namely, the loss of his actual earnings, the pain and suffering, and his expenses. For that purpose, which is altogether outside the Workmen's Compensation Act, 1906, in loss of earnings must be included in the same action all his sources of earnings. Those are the damages which he has suffered, and the real fallacy in the argument for the plaintiff in the present case is that I am asked to read the section as saying he "shall not be entitled to recover both damages in respect of loss in the employment in which he was injured"—or "in respect of loss of the employment in which he was injured"—"and compensation." I am asked to treat those damages as limited in that way. That is in substance what the argument comes to.

I think it is quite plain that that contention must be wrong. The right to recover damages in respect of a personal injury is one indivisible right, and when the statute says the workman is not entitled to recover damages—unless it divides the right to recover damages—it must mean that he is barred of his remedy for any common law damages which flow from the injury which he has traced to the negligence of the defendants. I do not think that the statute allows any other than that interpretation. The present case involves a curious position. It is not without its hardship to the plaintiff, but I am bound to say that I do not see any ground for doubting that in law he must fail in the

claim which he makes against the railway company. Therefore
I give judgment for the defendants.

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*Judgment accordingly.*LONDON AND
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Solicitors for plaintiff: *Coode, Kingdon & Cotton, for J. C. Milton, Chorley.*

Solicitor for defendants: *C. de J. Andrewes.*

J. E. A.

GAMBLE, APPELLANT v. JORDAN, RESPONDENT.

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May 8.

Rag Flock—Standard of Cleanliness—Making an Article of Bedding—Re-stuffing or re-making a Mattress—Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1.

By s. 1, sub-s. 1, of the Rag Flock Act, 1911, it shall not be lawful for any person to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose unless the flock conforms to the prescribed standard of cleanliness. If any person uses or has in his possession flock in contravention of the Act he is liable on summary conviction to a fine:—

Held, that the words “making any article of bedding” do not include the process of taking flock out of the covering of a mattress and refilling the covering with the same and no other flock.

CASE stated by a metropolitan magistrate.

The respondent, Edward T. D. Jordan, a sanitary inspector duly authorized by the Shoreditch Borough Council to take proceedings under the Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), on December 9, 1912, visited the residence of the appellant at 42, Aske Street, Shoreditch, and there found an old and used mattress a seam of which had been opened and from which the greater part of the stuffing of rag flock had been removed apparently for the purpose of re-stuffing the same mattress with the same flock, a process known in the trade as “re-making.” The respondent took one sample of the flock from the quantity already removed from the mattress and one sample from the flock remaining within the mattress. These samples after having been well mixed were submitted for analysis and duly analysed by the public analyst under the regulations of the

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Local Government Board made under s. 1, sub-s. 1, of the Rag Flock Act, 1911. (1)

No. 1 of these regulations provides as follows: "Flock shall be deemed to conform to the standard of cleanliness for the purpose of s. 1, sub-s. 1, of the Act when the amount of soluble chlorine in the form of chlorides removed by thorough washing with distilled water at a temperature not exceeding 25 degrees Centigrade from not less than 40 grammes of a well mixed sample of flock does not exceed 30 parts of chlorine in 100,000 parts of flock."

The result of the analysis shewed that the sample, which weighed 13 ounces, contained 382·5 parts of soluble chlorine in the form of chlorides per 100,000 parts of the sample, being 352·5 parts per 100,000 in excess of the maximum allowed under the regulations.

The appellant was a mattress maker. At the request of his sister, one Mrs. Brooks, he had undertaken in his spare time at his own house for the sum of 1s. to re-make the mattress which belonged to Mrs. Brooks and had been in use for some considerable time. The appellant received the mattress, opened the seams, and removed the flock with the intention of putting it back in the same covering. The flock taken from the mattress was the only flock upon the premises, and was not the property of the appellant, who had no authority express or implied to do anything with or to the flock, or the mattress except to take the flock out of the covering and re-stuff the covering with the same

(1) Rag Flock Act, 1911 (1 & 2 Geo. 5, c. 52), s. 1, sub-s. 1: "It shall not be lawful for any person to sell or have in his possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags or to have in his possession flock manufactured from rags intended to be used for any such purpose, unless the flock conforms to such standard of cleanliness as may be prescribed by regulations to be made by the Local Government

Board, and, if any person sells or uses or has in his possession flock in contravention of this Act, he shall be liable on summary conviction to a fine"

Sub-s. 4: "Where a person is charged with having flock in his possession in contravention of this Act any flock proved in the proceedings to have been found in his possession shall be deemed to be intended for sale or for use in the manufacture of such articles as aforesaid, unless the contrary is proved."

and no other and no more flock, the object of the re-stuffing being to secure a more even distribution of the flock within the mattress in order to add to the comfort of the same. To re-make or re-stuff a mattress effectually the whole of the flock should be removed from the mattress.

The re-making of flock mattresses is an important branch of the bedding trade. The washing of flock is done by flock manufacturers at flock mills. No bedding manufacturer attempts to wash flock or has any appliances for so doing. The re-making of a mattress consists of the removal and re-carding or combing of the flock and the replacing of the same. New flock is not supplied and additional flock is not used in the re-making of bedding except in case of special orders. No matter how clean the flock may have been originally, after any mattress has been in use for any length of time the flock may on analysis shew soluble chlorine in excess of the 30 parts per 100,000 parts allowed by the regulations. Very dirty flock can be detected by feel and smell, but as a rule it is impossible without analysis to tell whether flock conforms to the regulations or not. The sum hitherto paid in the trade for the re-making of a mattress is less than the cost of analysis.

The magistrate held that the re-stuffing or re-making of a mattress was the making of an article of bedding within the meaning of the Act and convicted the appellant, at whose request he stated a case in which the above facts appeared. The question for the Court was whether the magistrate was right in convicting the appellant.

Fox-Davies, for the appellant. The magistrate was wrong in convicting the appellant. The Act is aimed at the maker or manufacturer of upholstery, cushions, or bedding. The maker or manufacturer is the man who brings the article into being: *McNicol v. Pinch*. (1) A person who for his own purposes or at the request of another takes a mattress to pieces and puts it together again is outside the purview of this Act.

Bartley Denniss, for the respondent. The object of the Act was to prevent the use of foul flock. The person who re-makes old

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bedding is even more likely to thwart that object than the person who makes the bedding for the first time.

[BANKES J. On that construction a maid-servant who re-stuffed a cushion would be liable to a penalty.]

It would be a greater mischief if the whole industry of re-making bedding were exempt from the provisions of the Act.

Counsel was not heard in reply.

PHILLIMORE J. This appeal must be allowed. We are not to decide the case on the balance of public advantage, but upon the words of the statute. The whole point is whether the appellant was making or manufacturing a mattress. The best argument for the respondent is that the process on which the appellant was engaged is known in the trade as re-making; but that is a verbal and not a substantial argument. A man who picks to pieces a manufactured article and puts it together again does not make it. Therefore the appellant was not making, and did not have flock in his possession for the purpose of making, bedding. I desire to confine myself to the case where a man takes flock out of a mattress and then simply replaces it without any addition whatever. If he were to add anything it would be quite another matter. But the mere act of removing the contents of a mattress and then replacing them is not making or manufacturing a mattress.

BANKES J. I am of the same opinion. The summons charged the appellant with having unlawfully in his possession flock manufactured from rags intended to be used for the purpose of making upholstery, cushions, or bedding, which flock did not conform to the standard of cleanliness prescribed, &c. Sect. 1 of the Act makes it unlawful to have in one's possession for sale flock manufactured from rags or to use for the purpose of making any article of upholstery, cushions, or bedding flock manufactured from rags, or to have in one's possession flock manufactured from rags intended to be used for any such purpose. By sub-s. 4, where a person is charged with having flock in his possession in contravention of the Act any flock proved in the proceedings to have been found in his possession shall be deemed to be intended for sale or for use in the manufacture of such articles as aforesaid unless the contrary is proved.

It may be that sub-s. 4 substitutes the word "manufacture" for the word "make" used in sub-s. 1, but in my opinion no distinction ought to be drawn between the two expressions. As to their meaning, the view of Bray J. in *McNicol v. Pinch* (1) seems to me to be the true one. Speaking of saccharin "manufactured" within the meaning of s. 5, sub-s. 2, of the Finance Act, 1901, that learned judge said, "I think the word 'manufactured' rather means bringing into being as saccharin." That is the true meaning of making or manufacturing. If so, it must be shewn that the appellant was bringing into being a mattress. In my judgment that is not what the appellant was doing. He was performing an operation upon a mattress already in being.

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AVORY J. This Court is not entitled to take into consideration other possible mischief which may not have been contemplated by this legislation. We have only to give effect to the words of the Act and not to strain them to cover other cases although to do so would have the desirable affect of preventing people from sleeping on unwholesome mattresses. Sect. 1, sub-ss. 1 and 4, subject to the penalty persons who are making or manufacturing upholstery, cushions, or bedding out of unwholesome flock which they have in their possession, by purchase or otherwise, for the purpose of making or manufacturing new upholstery, cushions, or bedding. In one sense a new mattress may be made out of a secondhand one; new covering may be put upon old stuffing, or an old cover may be stuffed with new flock. Those are not the operations in question. In my opinion the answer to the question asked by the magistrate is that re-making or re-stuffing as described in this special case is not making any article of upholstery, cushions, or bedding within the meaning of the Act, and therefore the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Shepheards & Walters.*

Solicitor for respondent: *R. Cecil Ray.*

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May 8.

WARD, APPELLANT *v.* W. H. SMITH & SON, RESPONDENTS.

Shop—Shop Assistant — Hours of Employment—Employment after half-past 1 —Assistant working contrary to Orders — Shops Act, 1912 (2 Geo. 5, c. 3), ss. 1, 14.

By s. 1, sub-s. 1, of the Shops Act, 1912, on at least one weekday in each week a shop assistant shall not be employed about the business of a shop after half-past 1 o'clock in the afternoon. By sub-s. 4, in the case of any contravention of, or failure to comply with, the provisions of the section, the occupier of the shop shall be guilty of an offence under the Act.

By s. 14, sub-s. 2, where an offence for which the occupier of a shop is liable has in fact been committed by some manager, agent, servant, or other person, the manager, agent, servant, or other person shall be liable to the like penalty as if he were the occupier. By sub-s. 3, where the occupier is charged with an offence against the Act he is entitled upon information laid by him to have any other person whom he charges as the actual offender brought before the Court, and if he proves that he has used due diligence to enforce the execution of the Act, and that the other person has committed the offence without his knowledge, consent, or connivance, the other person shall be convicted, and the occupier shall be exempt from any fine.

The owners of a bookstall, who were alleged to be the occupiers of a shop within the meaning of the Act, had given notice to the clerk in charge of the bookstall requiring him to take his weekly half-holiday and had, so far as they were able, insisted upon his taking it. They had in pursuance of s. 1, sub-s. 2, of the Act fixed and specified by notice in the bookstall in the prescribed form a certain day of the week on which the clerk was not employed after half-past 1 o'clock in the afternoon. It made no pecuniary difference to him whether he took the weekly half-holiday or not. In a certain week in disobedience to his orders he took no weekly half-holiday and persisted in working in the bookstall after half-past 1 on the day specified.

On an information laid against the alleged occupiers:—

Held by Phillimore and Bankes JJ. (Avory J. dissenting), assuming the bookstall to be a shop, that an offence had been committed under s. 1, sub-s. 1, of the Act, and that the proper course for the occupiers was to lay an information against the clerk and bring him before the Court under s. 14, sub-s. 3, of the Act.

CASE stated by justices of the county of Essex.

An information was preferred by Adam Ward, the appellant, under the Shops Act, 1912 (1), against W. H. Smith & Son,

(1) Shops Act, 1912 (2 Geo. 5, one week day in each week a shop c. 3), s. 1, sub-s. 1: "On at least assistant shall not be employed"

the respondents, for that they at Stanstead in the county of Essex did unlawfully employ a shop assistant, one Percy John Postle, in their business of a shop at the railway station at Stanstead after half-past 1 in the afternoon on each weekday in the week ending January 18, 1913, contrary to the statute.

The justices dismissed the information, but stated a case in which the following facts appeared :—

(a) The appellant is an inspector appointed by the Essex County Council under the Shops Act, 1912. The respondents are the owners of a bookstall placed on the platform of the station of the Great Eastern Railway at Stanstead.

(b) The bookstall is under the control of the said P. J. Postle as the clerk in charge for and on behalf of the respondents.

(c) The respondents had on some part of the bookstall the statutory notice stating that Wednesday was taken as the half-holiday in accordance with the provisions of s. 1, sub-s. 2, of the Shops Act, 1912.

(d) During the week ending January 18 the said P. J. Postle was engaged or otherwise employed at the bookstall on every day of that week and no half-holiday was taken by him.

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about the business of a shop after half-past one o'clock in the afternoon : Provided," &c.

Sub-s. 2: "The occupier of a shop shall fix the day of the week on which his shop assistants are not employed after half-past one o'clock"

Sub-s. 4: "In the case of any contravention of, or failure to comply with, the provisions of this section, the occupier of the shop shall be guilty of an offence against this Act, and shall be liable to a fine"

Sect. 14, sub-s. 2: "Where an offence for which the occupier of a shop is liable under this Act, has, in fact, been committed by some manager, agent, servant, or other person, the manager, agent, servant, or

other person shall be liable to the like penalty as if he were the occupier."

Sub-s. 3: "Where the occupier of a shop is charged with an offence against this Act, he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, he proves to the satisfaction of the Court that he has used due diligence to enforce the execution of the Act, and that the said other person has committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine."

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(e) On Wednesday of the week in question the said P. J. Postle was engaged in stocktaking and getting matters ready to be in a position to deal with them with the superintendent of the respondents on the following day.

(f) The said P. J. Postle admitted that he did not take his weekly half-holiday and he did not intend to take it notwithstanding the fact that the respondents had sent him notice requiring him to take the weekly half-holiday.

(g) The respondents had not laid any information charging any other person as the actual offender under s. 14, sub-s. 3, of the Act.

(h) The bookstall in question was a shut-up movable structure with an office attached thereto which is without a fireplace and in which there is only room for the clerk in charge to sit, and would take about an hour or an hour and a half to take down and fix up again in the same condition. It was not separately rated, but was part and parcel of the railway station premises.

(i) The bookstall is placed on, but not fixed in, the ground, and at night is closed by shutters.

(j) The articles sold on the bookstall, besides papers, periodicals, and magazines, include watches, perfumes, pens, bags, purses, and stationery, and are supplied to railway passengers and to people coming to and from the town.

(k) The orders taken and the purchases made are usually taken and made in front of the bookstall and on that part of the station platform which forms no part of the site of the bookstall.

(l) On the Wednesday afternoon in question the only business, other than that stated in paragraph (e), transacted by the said P. J. Postle was that of selling newspapers on the railway platform.

At the hearing the respondents called as a witness the said P. J. Postle, who proved that he had received notice from the respondents requiring him to take his half-holiday and that they, so far as they were able, had insisted upon his taking it, and it made no financial difference to him whether he took the holiday or not.

The appellant contended that the respondents ought to be convicted on the ground that the bookstall was a shop within the

meaning of s. 19 of the Act, and that the said P. J. Postle was a shop assistant within the meaning of the same section.

The respondents contended—

(a) that the bookstall was not a shop within the meaning of s. 19;

(b) that the said P. J. Postle was not an assistant wholly or mainly employed in a shop within the meaning of ss. 1 and 19;

(c) that the sale of papers by the said P. J. Postle on the day in question was made on the railway platform and not inside a building or structure as contemplated by the Act;

(d) that the respondents had taken such steps as they were able for insisting upon their employees taking one half day holiday in each week, and that if the clerk in charge of the bookstall in question did not obey his employers' instructions they could not be made responsible for his disobedience to their commands in the non-observance of the Act on the principle of *Robinson v. Melville*. (1)

The justices were of opinion that the contentions of the respondents were well founded, and they dismissed the information as above stated.

If the Court should be of opinion that the decision dismissing the information was wrong, it was desired that the case should be remitted to the justices with the opinion of the Court thereon for further consideration and adjudication by them.

R. M. Montgomery, for the appellant. The justices have held on the authority of *Robinson v. Melville* (1) that no offence for which the occupier is liable has been committed where it is shewn that he has used due diligence to enforce the execution of the Act. That case was decided under the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), which by s. 10 prohibited women from being employed in factories or workshops except during certain hours. Two women without the knowledge of the employers or their forewoman worked in a workshop after the prescribed hours. Sect. 94 of that Act provided that any woman who worked in a factory or workshop should, save as otherwise provided by the Act, be deemed to be employed

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(1) (1890) 17 R. (Just. Cas.) 62.

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therein, and s. 83 provided that where a woman was employed in a factory or workshop contrary to the provisions of the Act, the occupier of the factory or workshop should be liable to a fine. The Court of Justiciary held, notwithstanding s. 94 of the Act, that the occupier was not liable. That case is opposed to the later decision of the Divisional Court in *Prior v. Slaithwaite Spinning Co.* (1) and should not be followed. The scheme of the Shops Act, 1912, is this: By s. 1, sub-s. 1, shop assistants are not to be employed about the business of a shop after half-past 1 o'clock in the afternoon. By sub-s. 4, in the case of any failure to comply with the section, the occupier is guilty of an offence. If an assistant works in the shop after the prescribed hour there has been a failure to comply with the section; therefore the occupier is liable. Then by s. 14, sub-s. 2, where an offence for which the occupier is liable has in fact been committed by some manager, agent, servant, or other person the manager, agent, servant, or other person is liable to the like penalty as if he were the occupier; and by sub-s. 3, if the occupier is charged with an offence he may lay an information against any other person whom he charges as the actual offender and have him brought before the Court, and if he proves that he himself has used due diligence to enforce the execution of the Act, and that the offence has been committed without his knowledge, consent, or connivance, the actual offender is to be convicted and the occupier is exempt. Until he avails himself of s. 14 the occupier remains liable; the respondents have not taken this step in the present case. Therefore the decision of the magistrates was wrong.

F. E. Smith, K.C., and *Maurice Beachcroft*, for the respondents. The words of s. 1, sub-s. 1, are "a shop assistant shall not be employed"; "employed" means employed by the occupier of the shop or by some one else for whom he is responsible, e.g., his manager or agent. Where an assistant is not employed by the occupier or by his manager or agent no offence is committed; at any rate no offence for which the occupier of the shop is liable, to use the words of s. 14, sub-s. 2. Where such an offence has been committed, that is to say where an assistant has been employed

(1) [1898] 1 Q. B. 881.

about the business of a shop by a manager, agent, servant, or other person, in that case by s. 14, sub-s. 2, the manager, agent, &c., is liable as if he were the occupier; and by sub-s. 3, if the occupier is charged he may bring before the Court any person whom he charges as the actual offender. But where, as in the present case, the assistant has not been employed by anybody, but has attended at the shop for his own purposes and in breach of his orders, it was never intended to make the occupier of the shop liable to a fine in such a case.

Montgomery in reply. Even on the respondents' own argument they are liable. Postle was an agent or manager of the respondents. If he employs himself, an offence has been committed for which the respondents are liable within the meaning of s. 14, sub-s. 2. They can only discharge themselves from liability by taking steps under s. 14, sub-s. 3, to bring Postle before the Court.

[The question whether the bookstall was a shop or not was also argued by counsel on both sides; and s. 19 of the Act was cited, which enacts that "the expression 'shop' includes any premises where any retail trade or business is carried on," and that "the expression 'shop assistant' means any person wholly or mainly employed in a shop in connexion with the serving of customers or the receipt of orders or the despatch of goods." As the Court gave no decision upon this point, the arguments are not reported.]

AVORY J. In this case the following facts are stated: that Postle was a clerk in charge of the bookstall, and "that he had received notice from the respondents requiring him to take his half-holiday and that they, so far as they were able, had insisted upon his taking it, and it made no financial difference to him whether he took the holiday or not." On those facts I think the justices were right in saying that the respondents as occupiers had not committed any offence under s. 1, sub-s. 1, of the Act. That enactment means that if the occupier of a shop employs an assistant about the shop after half-past 1 o'clock on a certain day, he commits an offence. In the present case Wednesday was the material day. On that day the respondents

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were not employing Postle about the business of the shop. I cannot think that the Legislature intended to make an occupier guilty of an offence who has done everything he could do to comply with the Act. In my opinion this case ought to be decided upon the same footing as if it were an offence under s. 4 of the Act, which provides that every shop shall, save as therein provided, be closed for the serving of customers not later than 1 o'clock in the afternoon on one weekday in each week. If the occupier were to close the shop on the specified day and after he has gone an assistant should return and open the shop for his own purposes and without his employer's knowledge, would the occupier be liable? In my opinion he would not. Similarly under s. 1 the occupier is not liable in a case where the facts shew that he was not employing the assistant. I do not think that the assistant can be said to have committed the offence of employing himself, and therefore sub-ss. 2 and 3 of s. 14 have no application to this case. In my opinion, therefore, the justices came to a right conclusion.

BANKES J. I regret to say that I take a different view. The object of this Act is to enforce the weekly half-holiday and make it compulsory on shop assistants. The language of the Act is not very definite, but this much is clear, that s. 1, sub-s. 1, provides that on at least one weekday in each week a shop assistant shall not be employed about the business of a shop after the hour named. Sect. 1, sub-s. 4, and s. 14, sub-ss. 2 and 3, throw further light on the meaning of the Legislature. By s. 1, sub-s. 4, in case of any contravention of or failure to comply with the provisions of s. 1, the occupier of the shop is guilty of an offence against the Act. By s. 14, sub-s. 2, where an offence for which the occupier of a shop is liable under the Act has in fact been committed by some manager, agent, servant, or other person, the manager, agent, servant, or other person is to be liable as if he were the occupier. There may be many cases where it is to the interest of the assistant not to take the weekly half-holiday. If he omits to do so, there is a contravention of or failure to comply with the provisions of the Act, and by s. 1, sub-s. 4, the occupier is liable. Then s. 14, sub-s. 2, provides for the case where an

occupier has been made liable, although he knew nothing of the breach of the statute and may have expressly forbidden, and done his utmost to prevent, the doing of that which constitutes the contravention of or failure to comply with the statute. Sect. 14, sub-s. 2, was passed for his protection; it begins with these words: "Where an offence for which the occupier of a shop is liable under this Act, has, in fact, been committed by some manager, agent, servant, or other person," the manager, servant, or other person is to be liable. Therefore it assumes that a servant may be guilty of a contravention of the Act, and when the word "servant" is found in connection with "manager" and "agent" it clearly means one who is a mere servant. A mere servant contravenes the Act by working after hours on the specified day. It follows that a servant working after hours commits an offence within s. 1. By s. 14, sub-s. 3, the occupier of a shop when charged with an offence may have any other person whom he charges as the actual offender brought before the Court; and if he proves to the satisfaction of the Court that he has used due diligence to enforce the execution of the Act, and that the other person has committed the offence without his knowledge, consent, or connivance, the other person is to be summarily convicted, and the occupier is to be exempt from any fine. In the present case it is clear that the respondents did everything they could to prevent the Act from being infringed; but nevertheless there was a contravention of the Act. There was an offence by Postle himself. He will be fined, as he ought to be, if the object of the Act is to compel him to take the weekly half-holiday, and the respondents will be exempt, as they ought to be, if they take the proper steps to bring the real offender before the Court and shew that they have used due diligence to enforce the execution of the Act, and that the offence was committed without their knowledge, consent, or connivance. The scheme of the Act is to enforce a compulsory half-holiday on all shop assistants; if they insist on working in spite of its provisions they are rendered liable; the occupier of the shop is *prima facie* liable if an offence has been in fact committed; but he is entitled to be exonerated if he takes the steps which I have just mentioned. In my view

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therefore the justices were wrong, and the appeal should be allowed.

PHILLIMORE J. I agree in the conclusion arrived at by my brother Bankes. The case of *Robinson v. Melville* (1) does not help us much because it was decided without sufficient consideration of s. 94 of the Act then in question, the Factory and Workshop Act, 1878, a section to which attention was most properly drawn in *Prior v. Slaithwaite Spinning Co.* (2)

In my view, having regard to s. 1, sub-ss. 1, 2, and 4, a man is employed in a shop if he is doing the work which naturally falls to him as a shop assistant, whether it is done by or without or even against the orders of his employer or a foreman. That consideration covers the greater part of this case. An escape for an innocent occupier is provided by s. 14. This is a type of legislation with which we are now familiar, whereby a prima facie liability is imposed upon a master or dominus from which however he can extricate himself, but from which he must extricate himself, or otherwise he remains liable. The scheme of the Act is first to find the de facto employer; an information may be laid against the occupier of the shop. His way of escape is by s. 14. He may set up a defence not unlike the defence of warranty which the seller of food may set up under the Sale of Food and Drugs Act. He may shew that the offence was not committed by his fault. To do this he must bring the real offender before the Court. I need not go the length of saying, as my brother Bankes says, that an offence is committed by the person who works after hours on the specified day. In the expression "manager, agent, servant, or other person" in s. 14, sub-s. 2, "servant" may mean some servant other than the one who actually works after hours, for example, some assistant behind the counter who orders an errand boy to deliver a parcel after hours. At any rate it is not necessary to hold that "servant" in that sub-section includes the actual employee who works after hours. In the present case Postle in fact committed the offence whether as manager or agent of the respondents or as a servant in the sense of one who

(1) 17 R. (Just. Cas.) 62.

(2) [1898] 2 Q. B. 881.

employs a fellow servant to work in contravention of the Act. It may be that he was employing himself. He was the only person present and the only person who could carry out the orders of the manager, and I think he was the person who is indicated as the actual offender in s. 14, sub-s. 3.

As to whether this bookstall was a shop, the form in which this case is stated renders it unnecessary to decide that question at present.

The justices having dismissed the information ask the opinion of this Court in the following form:—"If the Court should be of opinion that our decision dismissing the information was wrong it is desired that the case shall be remitted back to us with the opinion of the Court thereon for further consideration and adjudication by us, but if otherwise our decision to stand." This being so, the respondents ought to be entitled to avail themselves of the provisions of s. 14. It may also be that there are other matters which may be raised on their behalf. The appeal will be allowed and the case will be remitted to the justices for further consideration and adjudication.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for J. H. Goold, Chelmsford.*

Solicitors for respondents: *Bircham & Co.*

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June 16.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* TRUEMAN.

Criminal Law—Libel—Sentence of Imprisonment for Maximum Term—Recognizances to keep Peace—Sureties—Imprisonment in Default of finding Sureties—Jurisdiction.

Where a person is convicted of maliciously publishing a defamatory libel under s. 5 of the Libel Act, 1843, the Court may as part of its sentence, in addition to ordering the defendant to be imprisoned for the maximum term allowed by that section, order him upon the expiration of that term to enter into recognizances and find sureties to keep the peace for a reasonable time named in the order, and in default of his so doing to be further imprisoned until the expiration of the period during which he is so required to keep the peace.

APPEAL to the Court of Criminal Appeal against sentence.

The prisoner was convicted at the Cardiff Assizes before Avory J., under s. 5 of the Libel Act, 1843 (6 & 7 Vict. c. 96), of having maliciously published a defamatory libel, and was sentenced to be imprisoned for twelve months, to pay the costs of the prosecution, and at the expiration of the twelve months to enter into his own recognizances of 50*l.* and find one surety in 50*l.* to be of good behaviour and keep the peace for twelve months, and in default of entering into such recognizances and finding such surety to be further imprisoned for twelve months. The section under which he was convicted provides that "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the Court may award, such imprisonment not to exceed the term of one year."

Dodson, for the appellant. Except in cases within the Criminal Law Consolidation Acts, 1861,—24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38; and c. 100, s. 71—there is no jurisdiction to order an offender to be imprisoned in default of his finding sureties for his keeping the peace. In each of those Acts there is express power given to order imprisonment in that event, which would have been superfluous if there were jurisdiction to make such an order at common law. The law

on this point is so stated in Lord Halsbury's Laws of England, vol. ix., s. 790, and in Archbold's Criminal Pleading, 24th ed., at p. 257. If that is so, the judge had no jurisdiction to make the order here, for libel is not one of the offences dealt with in those Acts. It is true that in *Dunn v. Reg.* (1) it was held by the Exchequer Chamber in a case of perjury that a sentence of imprisonment and to give security to keep the peace for two years from the expiration of the said term of imprisonment and to be further imprisoned until such security be given was good, Alderson B. pointing out that the imprisonment in default of finding sureties would not be for an indefinite time, but only until the expiration of the two years. But the Court there purported to found themselves upon the answer given by the judges to a question put to them by the House of Lords in *Rex v. Hart* (2), and as appears from the report of that case in the State Trials, and from the entry in the Lords' Journals, cited 12 Q. B. at p. 1041, n., though the judges said that the defendant might be ordered to find sureties they said nothing as to imprisonment on failure to find them.

Secondly, if there is a power in the Court to order a further term of imprisonment in default of sureties, then in a case in which there is a maximum term of imprisonment fixed by law for the principal offence, as the further imprisonment in default of sureties is part of the sentence for the principal offence, it must be limited to such a term as together with the term of imprisonment for the principal offence will not exceed the maximum; and consequently where, as here, the Court has already inflicted the maximum term of imprisonment for the principal offence its power to order imprisonment is exhausted.

Ivor Bowen, K.C., and *Trevor Hunter*, for the Crown, were not called upon.

The judgment of the COURT (Darling, Rowlatt, and Atkin JJ.) was delivered by

ROWLATT J. In this case leave was granted to the appellant to appeal against the sentence imposed upon him on a conviction under s. 5 of the Libel Act, 1843. The sentence was that he

(1) (1847) 12 Q. B. 1031.

(2) (1808) 30 St. Tr. 1131, at p. 1344.

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should be imprisoned for twelve months, should pay the costs of the prosecution, and at the expiration of the twelve months should enter into his own recognizances of 50*l.* and find one surety in 50*l.* to be of good behaviour and keep the peace for twelve months, and in default of entering into such recognizances and finding such surety should be further imprisoned for twelve months. It was contended on his behalf that there was no power to award imprisonment in default of finding a surety. It was said that the Libel Act did not give such a power, and there was no such power at common law. In our opinion that contention is ill-founded. It is clear that at common law in the case of misdemeanours the Court might in addition to a sentence of imprisonment order the defendant to find sureties to keep the peace for a reasonable time specified in the order and in default of his so doing to be further imprisoned until the expiration of the period during which he was so required to keep the peace. It may perhaps be said that an order to find sureties is not so much a punishment for a past offence as a preventive against the commission of further ones; but it is settled by the case of *Dunn v. Reg.* (1) that a sentence of further imprisonment in default of finding sureties may be added to the principal sentence of imprisonment. It was contended, however, that the only punishment that can be imposed for this offence is that which is prescribed by the Act in s. 5. If the proper construction of that section were that it exhaustively defines the sentence which the Court may pass, then no doubt the Court could not order the defendant to find sureties. But that section did not create the offence. The offence existed at common law, and there is nothing in the section to limit the power of the Court to pass any sentence in respect of it that it could have passed at common law. If then that section stood alone it could not be said to have taken away the power to order the defendant to find sureties to keep the peace. But our attention was called to certain later Acts, the Criminal Law Consolidation Acts of 1861, in each of which is inserted an express provision that the Court may order the defendant to find sureties and to be imprisoned until they are found, not merely in cases of felonies, in which

(1) 12 Q. B. 1031.

there was admittedly no power at common law to require the defendant to find sureties, but also in cases of misdemeanours and we were asked to draw the inference that but for that express provision the Court would not have had that power even in cases of misdemeanours, and that as there is no corresponding provision in the Libel Act, 1843, such an order cannot be made in a case of libel. We think that those provisions were inserted in the Acts of 1861 either out of abundant caution or because those Acts purported to be Consolidation Acts, and not because the insertion of the provisions was thought to be necessary in order to give the Court the power. In any case the provisions in those later Acts cannot affect the construction to be put upon the earlier Act of 1843. We think that the appellant's contention must fail. Indeed it would be unfortunate if it were to prevail, for there would then be no power to order the defendant to find sureties in lieu of inflicting upon him any punishment at all.

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Appeal dismissed.

Solicitors for appellant: *Crowders, Vizard, Oldham & Co., for G. & O. New, Evesham.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

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June 16.

[COURT OF CRIMINAL APPEAL.]

THE KING v. CAWTHRON.

Criminal Law—Sentence—Whipping—“Offender whose age does not exceed sixteen years”—Whether Age to be considered as of Date of Offence or of Conviction—Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4.

An offender against s. 4 of the Criminal Law Amendment Act, 1885, whose age exceeds sixteen years at the date of conviction, though he was under sixteen at the date of the offence, is not “an offender whose age does not exceed sixteen years” within the meaning of that section and cannot be sentenced to be whipped.

APPEAL to the Court of Criminal Appeal against sentence.

The appellant was convicted at the Cambridge Assizes before Lawrence J. under s. 4 of the Criminal Law Amendment Act, 1885, of having had carnal knowledge of a girl under the age of thirteen years. That section, after enacting that any person convicted of that offence may be sentenced to penal servitude for life or for any term not less than five years, or be imprisoned for any term not exceeding two years, provides that “in the case of an offender whose age does not exceed sixteen years the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped.” It appeared that at the date of the commission of the offence the appellant was under the age of sixteen, but that at the date of his conviction he had completed his sixteenth year. Lawrence J. said that if he had the power to do so he would order him to be whipped instead of being imprisoned, but being of opinion that under the circumstances he had no such power he sentenced him to twelve months’ hard labour. The appellant contended that the judge had the power to order him to be whipped and invited the Court to substitute that punishment for imprisonment.

H. St. J. Raikes, for the appellant. The words “an offender whose age does not exceed sixteen years” mean one whose age does not exceed sixteen years “at the date of the offence.” The punishment ought to have relation to the gravity of the offence, which is less in a young person than in an older one; and the

severity of the punishment ought not to be increased because of something which has happened since the offence was committed. If the Legislature had meant the proviso to apply only to an offender who was under the age of sixteen at the time when he was brought before the Court for trial it would have said so plainly, as it did in s. 123, sub-s. 1, of the Children Act, 1908 (8 Edw. 7, c. 67), which provides that "Where a person, whether charged with an offence or not, is brought before any Court . . . and it appears to the Court that he is a child or young person" then the consequences provided by the Act shall follow.

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F. K. North, for the Crown, was not called upon.

The judgment of the Court (*Darling, Rowlatt, and Atkin JJ.*) was delivered by

DARLING J. In this case the appellant was convicted under s. 4 of the Criminal Law Amendment Act, 1885, of an offence which rendered him liable to a sentence of penal servitude for life or of imprisonment for any term not exceeding two years. That section contains a proviso that in the case of such an offence being committed by a person "whose age does not exceed sixteen years" the Court may instead of sentencing him to any term of imprisonment order him to be whipped. The trial took place before Lawrence J., and at the date of the trial the appellant was over sixteen years of age, though at the time of the commission of the offence he was under sixteen. The judge, being of opinion that he had no power to order him to be whipped under the proviso, sentenced him to twelve months' hard labour, but said that if he had had the power he would have ordered him to be whipped instead of being sent to prison. The question which we have to decide is whether the appellant was a person under the age of sixteen within the meaning of the proviso. The words of the section are "whose age does not exceed sixteen years," not "whose age did not exceed sixteen years" at some earlier date, and the words must be taken as referring to the time at which the person is brought before the Court and convicted. Mr. Raikes argued that if the Legislature had meant to refer to the date when the offender was brought before the Court they would have said so clearly as they did in s. 123 of the Children Act, 1908.

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It is true that s. 4 of the Act of 1885 does not in terms refer to the time when the offender is "brought before the Court," but I think that that is what it means. In the course of argument I put to Mr. Raikes an extreme case of a boy of the age of fifteen committing an offence under this section and then running away and evading prosecution until after a lapse of twenty years, and I asked whether upon conviction at the age of thirty-five he could be ordered to be whipped. He was obliged to contend that he could. That is no doubt a case which is very unlikely to occur, but it affords a good test of the soundness of the contention, and is to my mind enough to shew that it cannot be supported. In our opinion the meaning of the Legislature was that only young persons who were under the age of sixteen at the time when the sentence was pronounced should be punished by whipping. In the present case the judge had no power to order the appellant to be whipped, and the sentence which he passed being the only one which by law he was empowered to impose, the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant : *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown : *Director of Public Prosecutions.*

J. F. C.

[COURT OF CRIMINAL APPEAL.]

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June 2, 23.

THE KING v. RABJOHNS.

Criminal Law—Penal Servitude—Holder of Licence—Indictment for another Offence—Plea of Guilty—Bound over to come up for Judgment—"Conviction"—Forfeiture of Licence—Unexpired Portion of Previous Sentence—Liability to Serve—Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), ss. 4, 9.

The Penal Servitude Act, 1864, provides by s. 4 that if the holder of a licence granted under the Penal Servitude Acts "is convicted, either by the verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction"; and by s. 9 (as amended by s. 3, sub-s. 3, of the Penal Servitude Act, 1891), where a licence "is forfeited by a conviction on indictment of any offence, . . . the person whose licence is forfeited . . . shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited . . . , further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted":—

Held, that the holder of a licence, who pleads guilty to an indictable offence and is bound over to come up for judgment when called on, has been "convicted" within the meaning of s. 4, and his licence is forfeited, and under s. 9 he may be detained in custody and compelled to serve a term of penal servitude equal to the unexpired portion of his previous sentence.

APPEAL against a sentence of five years' penal servitude imposed by Darling J. at the Leeds Assizes.

The facts as stated in the written judgment of the Court were as follows:—The appellant was indicted at the Leeds Assizes for arson. He pleaded guilty. He had been twice previously convicted of the same offence, and sentenced to terms of three years' and five years' penal servitude respectively. At the time he committed the offence of which he pleaded guilty he was out on licence, having a period of one year and ninety-five days of his last term of penal servitude unexpired. Darling J. considered that the best way to deal with the appellant was to bind him over to come up for judgment when called on, being of opinion that the effect of the appellant's plea of guilty would be to revoke his licence and to subject him to serve the unexpired portion of his previous sentence. He accordingly bound him over. The attention of

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the learned judge was then called by the governor of the gaol to the following circular, L. P. 15/1912, dated November 8, 1912, and issued from the Prison Commission to the governors of prisons:—"Governors are informed that whenever a prisoner, who is the holder of a penal servitude licence, is brought up for trial on a fresh charge at assizes or quarter sessions and the Court decides to bind him over after a verdict or plea of guilty, he should be liberated as soon as he has complied with the formalities of the Court. As the conviction is not complete until judgment has been passed, the licence is not forfeited by the conviction. No fresh licence is necessary in such a case. B. H. Thomson, Secretary." On his attention being called to this circular, the learned judge recalled the prisoner and sentenced him to a term of penal servitude, giving him at the same time leave to appeal so that the question raised by the aforesaid circular might be discussed.

N. L. C. Macaskie, for the appellant. Sect. 4 of the Penal Servitude Act, 1864, provides that if the holder of a licence granted under the Penal Servitude Acts "is convicted, either by the verdict of a jury or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction." The view expressed in the circular of the Prison Commissioners, that the conviction is not complete until judgment has been passed, is erroneous. For the purposes of s. 4 the verdict of the jury or the plea of guilty is the conviction. The appellant's licence was, therefore, forfeited, and under s. 9 of the Act of 1864 he becomes liable to undergo a term of penal servitude equal to the portion of the term that was unexpired when his licence was granted. It is true that s. 9 provides that the prisoner shall serve the remainder of the unexpired term "after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence was forfeited or revoked," but that only means that if a sentence is imposed for the later offence that sentence shall be served before the completion of the earlier sentence. It does not mean that if the prisoner is bound over to come up for judgment he cannot be compelled

to serve the unexpired period of the previous sentence. [He referred to *Rex v. Smith*. (1)]

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A. Morley, for the prosecution. The word "conviction" is a word of double meaning. It may mean only the verdict of the jury or a plea of guilty: *Reg. v. Blaby* (2); or it may mean judgment pronounced after verdict or confession: *Burgess v. Boetefeur*. (3) If ss. 4 and 9 of the Act of 1864 are read together, the only meaning which can be given to the word "conviction" in s. 4 is the verdict or plea of guilty followed by judgment, for s. 9 only provides for the serving of the remainder of the previous sentence after the sentence for the later offence has been served. There is nothing in s. 9 to warrant the detention in custody of a prisoner who has merely been bound over to come up for judgment, and, therefore, in the circumstances of this case, a sentence of penal servitude was rightly imposed.

Cur. adv. vult.

June 23. The judgment of the Court (Darling, Bankes, and Lush JJ.) was read by

BANKES J. The question for decision in this case has reference to the proper construction to be put upon ss. 4 and 9 of the Penal Servitude Act, 1864. The matter arises in this way. (The facts were stated as set out above.) Upon a consideration of the various statutes dealing with the granting of licences to persons undergoing terms of penal servitude and of the cases cited during the argument, the Court is of opinion that the reason given in the circular for the action to be taken by the governors of the gaols is not well founded.

Sect. 4 of the Penal Servitude Act, 1864, provides that "If any holder of a licence granted in the form" set forth in Schedule A to the Act "is convicted, either by the verdict of a jury, or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction." The meaning of the word "conviction" has been discussed in several cases. For instance, in *Burgess v.*

(1) [1909] 2 K. B. 756.

(2) [1894] 2 Q. B. 170.

(3) (1844) 7 Man. & G. 481.

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Boetefeur (1), where the question was as to the meaning of the word "convicted" in the statute 25 Geo. 2, c. 36, s. 5, and where after a plea of guilty judgment had been respited, it was held that the offender was not to be considered as convicted until the judgment of the Court upon the indictment against him was pronounced. In that case Tindal C.J. in giving judgment said (2) that "the word 'conviction' is undoubtedly verbum aequivocum. It is sometimes used as meaning the verdict of a jury, and at other times, in its more strictly legal sense, for the sentence of the Court."

In the present case the language of the statute itself seems to settle this question, as it uses the words "convicted by the verdict of a jury or upon his own confession," but apart from this the judgment of Stephen J. in *Jephson v. Barker* (3) disposes of any possible difficulty, as he there says that a binding over by the Court is the judgment of the Court for the purpose of completing a conviction. Whichever view, therefore, is taken of the meaning of the word "conviction" there has in the opinion of the Court been a conviction within the meaning of s. 4 of the Penal Servitude Act, 1864, whenever a prisoner has been found guilty on indictment by a jury or on his own confession, and has been bound over to come up for judgment when called on. To this extent, therefore, in the opinion of the Court the circular of the Prison Commissioners expresses an erroneous view of the law.

The further question has, however, to be disposed of, namely, whether where a prisoner on licence is convicted on indictment and merely bound over there is any power to keep him in custody and to compel him to serve out the unexpired portion of his sentence. The granting of licences and their forfeiture or revocation appear to be entirely regulated by statute. The power to grant a licence is conferred by s. 9 of the Penal Servitude Act, 1853, which also grants the power of revoking it. The machinery for dealing with a person whose licence is revoked is contained in s. 11 of the same statute, which provides for the issue of a warrant by a magistrate at the instance of one of His Majesty's principal Secretaries of State, and for the

(1) 7 Man. & G. 481.

(2) 7 Man. & G. at p. 504.

(3) (1886) 3 Times L. R. 40.

recommitment by a magistrate of the offender, when apprehended, to prison to undergo the residue of the sentence as if no such licence had been granted. Sect. 4 of the Penal Servitude Act, 1864, deals with the forfeiture of licences and provides for two cases in which a licence shall be forfeited: (a) the case now under discussion of a conviction on indictment; (b) the case of a convict failing to report himself, in which case he is to be deemed guilty of a misdemeanour, and on summary conviction thereof his licence is to be forfeited, but he is not to be liable to any other punishment by virtue of such conviction. Sect. 5 of the same statute creates a number of offences for which the holder of a licence may be punished summarily; and s. 8 provides the machinery for dealing with such an offender after conviction and apparently also with the case under (b), although under s. 4 the licence is already forfeited. Sect. 9 deals with the case of a person who is the holder of a licence in the form set forth in Schedule A to the statute and whose licence has been forfeited by a conviction on indictment for any offence or is revoked in pursuance of a summary conviction under that or any other statute, and it provides that such a person "shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted," and it provides for the removal of the convict from the prison in which he may be confined to any prison in which convicts under sentence of penal servitude may lawfully be confined by warrant under the hand and seal of any justice of the peace, and for his being dealt with there in all respects as if such term of penal servitude had formed part of his original sentence.

For the purpose of giving effect to the statute as a whole the Court is of opinion that the words from "after undergoing" to "further" in s. 9 should be read as if in parenthesis; and the section consequently must be read as providing that the convict shall in the event of forfeiture or revocation of his licence undergo the unexpired portion of his sentence, and in the event of his receiving any sentence for the offence which forfeited or

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revoked his licence he shall undergo such unexpired portion after the expiration of such sentence. The latter part of the section is directed to providing for the sequence of the punishments in the event of the offender whose licence is forfeited or revoked receiving any sentence of punishment at the time of his conviction. If he receives none this part of the section does not apply to his case. Read in this way the section covers all the cases that can occur, and the latter portion of it, which applies to every case, provides the machinery by which a person whose licence is forfeited or revoked can be compelled to serve the unexpired portion of his sentence, even though he is only bound over and not at the time of conviction sentenced to any punishment.

For the reasons above stated the Court is of opinion that the circular is not justified by the provisions of the Acts of Parliament regulating licences to convicts, and the Court is of opinion that the course originally proposed to be taken by Darling J. should be adopted in the present case. The decision of the Court, therefore, is to allow the appeal against sentence, and to substitute for the sentence an order, as originally intended by Darling J., directing the appellant to be bound over to be of good behaviour for a period of two years from the expiration of the unexpired portion of his last term of penal servitude and to come up for judgment when called on.

For the purpose of giving effect to this judgment the prisoner will enter into a recognizance before the visiting justices of the prison. The unexpired portion of his sentence will commence to run from the date of the conviction.

Appeal allowed.

Solicitor for appellant : *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution : *Director of Public Prosecutions.*

F. O. R.

DENNEY, GASQUET, AND METCALFE v. CONKLIN.

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[1912 D. 1286.]

June 10, 13.

Assignment—Debt—Sufficiency of Notice to Debtor—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6.

By s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, it is provided that "Any absolute assignment, by writing under the hand of the assignor . . . of any debt . . . of which express notice in writing shall have been given to the debtor . . . shall be and be deemed to have been effectual in law . . . to pass and transfer the legal right to such debt from the date of such notice, and all legal and other remedies for the same"

On December 5, 1907, the defendant owed the sum of 808*l.* to one Derham. On that day Derham by a deed of arrangement absolutely assigned to Denney and Gasquet (the trustees of the deed) all his personal property.

On April 8, 1908, the trustees' solicitors wrote to the defendant saying that "The trustees of the deed of arrangement dated the 5th of December, 1907, and executed by Mr. Walter Derham, have instructed us to apply to you for an account showing all dealings between yourself and Mr. Walter Derham. The reason of this application is that there appears from Mr. Derham's books to be a considerable debt due from you to him for money advanced."

On June 24, 1910, one Metcalfe was by deed appointed a new trustee of the deed of December 5, 1907, in substitution for Gasquet, but no notice of this deed was given to the defendant. In an action brought by Denney, Gasquet, and Metcalfe to recover the debt of 808*l.* from the defendant:—

Held, that the letter of April 8, 1908, constituted an express notice in writing of the assignment of the debt of 808*l.* within the meaning of the sub-section, inasmuch as, although not worded with the precision of a formal notice, it indicated with sufficient certainty to the defendant that Derham had executed a deed which assigned to the then trustees the debt formerly due to him, and that the debt when the amount was ascertained must be paid to the trustees and not to Derham; and the names of the assignees were sufficiently disclosed as there was an express and accurate reference to the deed to which the trustees were parties.

ACTION brought by the plaintiffs, of whom Denney and Gasquet were the original trustees of a deed of arrangement, dated December 5, 1907, made between one Walter Derham and the plaintiffs Denney and Gasquet, to recover from the defendant Conklin the sum of 808*l.* due by him to Derham at the date

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of the deed of arrangement for money lent, and assigned by Derham to the plaintiffs Denney and Gasquet by the deed.

The deed of arrangement contained an absolute assignment to the trustees Denney and Gasquet of all Derham's personal property, including therefore the debt of 808*l*. The plaintiff Metcalfe was a new trustee of the deed of December 5, 1907, who was appointed by deed dated June 24, 1910, in substitution for Gasquet, but as no notice of this deed was given to the defendant, Gasquet was joined as a plaintiff.

The only question was whether sufficient notice of the assignment of the debt to the plaintiffs Denney and Gasquet had been given to the defendant to satisfy the provisions of s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873. (1) The only notice given to the defendant was contained in the following letter from the plaintiffs' solicitors to the defendant:—

“ 16, Mincing Lane, E.C.

“ 8th April, 1908.

“ Dear Sir,

“ *Re* Yourself and Walter Derham.

“ The trustees of the deed of arrangement, dated the 5th of December, 1907, and executed by Mr. Walter Derham, have instructed us to apply to you for an account showing all dealings between yourself and Mr. Walter Derham. The reason of this application is that there appears from Mr. Derham's books to be a considerable debt due from you to him for money advanced.

“ An early reply will oblige.

“ Yours faithfully,

“ Gasquet, Metcalfe & Walton.

“ B. Conklin, Esq.,

“ Hotel Cecil, London.”

Armstrong White, for the plaintiffs. The letter of April 8, 1908, is “ express notice in writing ” within the meaning of s. 25,

(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6: “ Any absolute assignment, by writing under the hand of the assignor . . . of any debt . . . of which express notice in writing shall have been

given to the debtor . . . shall be . . . effectual in law . . . to pass and transfer the legal right to such debt . . . from the date of such notice, and all legal and other remedies for the same . . . ”

sub-s. 6, of the Supreme Court of Judicature Act, 1873. There is no authority shewing that any particular form of notice is necessary. Provided that the necessary information is conveyed to the recipient, the form of the notice is immaterial. The terms of the letter of April 8, 1908, are sufficient to give notice to the defendant that the debt had been assigned, and the date of the assignment, which is all-important (*Stanley v. English Fibres Industries, Ltd.* (1)), is correctly set out in the letter.

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Notice need not be given by any particular person : *Bateman v. Hunt* (2); and notice even in a newspaper is good notice : *Lloyd v. Banks.* (3) That case was before the Act of 1873 was passed, but the statute gives a wider right to assignees to sue for the debt.

Croom-Johnson, for the defendant. Sect. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873, must be construed strictly : *Stanley v. English Fibres Industries, Ltd.* (1)

In order to be valid the notice must expressly state (1.) that there has been an assignment; (2.) the names and addresses of the assignees so that the debtor may be in a position to seek out the new creditors created by the assignment for the purpose of paying the debt; and (3.) what has been assigned. A statement that all debts due to the assignor have been assigned would be sufficient provided that it was clearly made in the notice. This notice is bad as it fails in each of these requisites. A deed of arrangement does not necessarily connote the idea of an assignment of property. It may be a mere composition deed. The sub-section negatives the possibility of constructive notice.

Cur. adv. vult.

June 13. The following judgment was read by

ATKIN J. In this case the plaintiffs, the trustees of a deed of arrangement dated December 5, 1907, made between one Walter Derham and the plaintiffs Denney and Gasquet, sue the defendant to recover the sum of 808*l.*, due by the defendant to Derham at the date of the deed for money lent. The plaintiff Metcalfe is a new

(1) (1899) 68 L. J. (Q.B.) 839.

(2) [1904] 2 K. B. 530, at p. 538.

(3) (1868) L. R. 3 Ch. 488.

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trustee of the deed appointed by deed dated June 24, 1910, in substitution for the plaintiff Gasquet.

At the hearing it was proved to my satisfaction and indeed not disputed that on December 5, 1907, the defendant owed the sum claimed to Derham. The only point that was raised by the defendant was that no sufficient notice of assignment had been given to satisfy the provisions of s. 25, sub-s. 6, of the Supreme Court of Judicature Act, 1873.

The deed of arrangement dated December 5, 1907, contains an absolute assignment to the trustees of all Derham's personal property, including therefore this debt. On April 8, 1908, the solicitors for the trustees wrote to the defendant, and the defendant as I find received the letter dated April 8, 1908. [The learned judge having read the letter continued:] This letter the plaintiffs affirm and the defendant denies to be a sufficient notice of the assignment to comply with the section.

The words of the section are as follows: "Any absolute assignment, by writing under the hand of the assignor of any debt of which express notice in writing shall have been given to the debtor shall be effectual in law to pass and transfer the legal right to such debt from the date of such notice, and all legal and other remedies for the same"

It appears from the above section that the notice which has to be given in order to pass the legal right to the debt to the assignee is express notice in writing of any absolute assignment by writing under the hand of the assignor. The letter in question gives express notice to the defendant of the deed of arrangement, which as I have said is an absolute assignment. It may be that the section is not complied with unless the notice further proceeds to bring to the notice of the debtor with reasonable certainty the fact that the deed does assign the debt due from the debtor so as to bind the debt in his hands and prevent him from paying the debt to the original creditor.

In my opinion this letter, though not worded with the precision of a more formal notice, does indicate with sufficient certainty to the defendant that Derham has executed a deed which assigns to the trustees the debt formerly due to him; and that the debt

when the amount is ascertained must be paid to the trustees and not to Derham. Mr. Croom-Johnson on behalf of the defendant suggested that the last words of the letter indicate that the debt is still regarded as due to Derham, thereby negating the idea of an assignment. I think that the words "due from you to him" expressly relate to what is said to appear in Derham's books, and would accurately represent the effect of the books. It is further said that the names of the assignees are not sufficiently disclosed; but there is an express and accurate reference to the deed to which the trustees are parties, and in my opinion this contention is ill-founded. There must therefore be judgment for the plaintiffs for 808*l.* with costs.

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Judgment for plaintiffs.

Solicitors for plaintiffs: *Gasquet, Metcalfe & Walton.*

Solicitors for defendant: *Fisher & Son.*

J. E. A.

[IN THE COURT OF APPEAL.]

METROPOLITAN WATER BOARD v. BUNN.

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June 6, 9, 10.

Water Rate—Alternative Remedy—Court of Summary Jurisdiction—Court of Competent Jurisdiction—Period of Limitation—Lex Fori—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 74 and 85—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11—Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21—Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), ss. 3, 33.

By the joint operation of the Waterworks Clauses Act, 1847, ss. 74 and 85, the Railways Clauses Consolidation Act, 1845, s. 145, and the Summary Jurisdiction Act, 1848, s. 11, if any person liable to pay water rate neglect to pay the same, the undertakers may recover the rate if less than 20*l.* by summary proceeding before two justices within six calendar months from the time when the matter of complaint arose.

By the Waterworks Clauses Act, 1863, s. 21, if any person neglects to pay to the undertakers any rate due to them they may recover the same in any Court of competent jurisdiction, and this remedy is to be in addition to their other remedies for the recovery thereof.

Water rates to an amount less than 20*l.* became due and payable to undertakers whose special Act incorporated the Waterworks Clauses

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Acts, 1847 and 1863. More than six months after the date when the rates accrued due the undertakers brought an action in the county court, as being a Court of competent jurisdiction, to recover them :—

Held, that the remedy in the Court of competent jurisdiction was not subject to the six months' limitation to which summary proceedings before justices would have been subject.

Tottenham Local Board v. Rowell (1876) 1 Ex. D. 514, distinguished.

Blackburn Corporation v. Sanderson [1902] 1 K. B. 794, followed.

Decision of the Divisional Court [1913] 1 K. B. 134, affirmed.

APPEAL from the decision of a Divisional Court (Ridley and Scrutton JJ.), reported [1913] 1 K. B. 134.

The plaintiffs, the Metropolitan Water Board, sued Mary Elizabeth Winifrede Bunn, spinster, in the Westminster County Court, as being the owner of 189, 191, and 193, Mayall Road, Brixton, to recover a sum under 20*l.* in respect of water rate during the eight quarters to September 18, 1908.

The houses in Mayall Road were within the district formerly supplied by the Lambeth Waterworks Company, whose undertaking was by the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), transferred to and vested in the plaintiffs.

The rate for the first six quarters was by s. 6 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), recoverable under the provisions of the Lambeth Waterworks Act, 1848 (11 & 12 Vict. c. vii.); the rate for the last two quarters was recoverable under the provisions of the Metropolitan Water Board (Charges) Act, 1907.

The proceedings were taken under s. 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), which provides that "where the owner and not the occupier is liable by law or by agreement with the water company to the payment of the water rate in respect of any dwelling-house or part of a dwelling-house occupied as a separate tenement, no water company shall cut off the water supply for non-payment of the water rate, but such water rate, without prejudice to the other remedies of the company for enforcing payment thereof from such owner, shall, together with interest thereon at the rate of five pounds per centum per annum, computed from the expiration of one month from the time when the same has been claimed by the company until receipt thereof by the company, be a charge

on such dwelling-house in priority to all other charges affecting the premises; and (without prejudice to such charge) the amount may be recovered, with the costs incurred, from the owner or from the occupier for the time being in the same manner as water rates may by law be recovered"

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The summons was issued in the county court on December 20, 1911.

The defendant gave notice that she intended to rely on the following ground of defence, namely, that the claim for which she was summoned was barred by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 74 and 85, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145, and the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11. (1)

The county court judge held that the effect of the statutes was to bar the plaintiffs' claim at the end of six months after it arose, and gave judgment for the defendant.

The Divisional Court, upon appeal, reversed the decision of the county court judge, holding that the remedy in the Court of competent jurisdiction was not subject to the six months' limitation to which summary proceedings before justices would have been subject.

The defendant appealed.

Macmorran, K.C., and *Given*, for the appellant. The question is whether the six months' limitation imposed on summary proceedings by s. 11 of the Summary Jurisdiction Act, 1848, applies to an action brought under s. 4 of the Water Companies (Regulation of Powers) Act, 1887. The authorities are not easy to reconcile. In *Tottenham Local Board v. Rowell* (2) the Local Government Act (1858) Amendment Act, 1861, provided that proceedings for the recovery of demands below 20*l.*, which local boards were empowered to recover in a summary manner, might at the option of the local board be taken in the county court, and it was held that the six months' limitation mentioned in s. 11 of the Summary Jurisdiction Act, 1848, applied as well to proceedings in county courts as to proceedings before justices. That

(1) See p. 196, *post*.

(2) 1 Ex. D. 514.

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case was distinguished in *Mayor of Leeds v. Robshaw* (1), where, however, the two sections in question were sections of the same Act. Then came *Vestry of Hammersmith v. Lowenfeld* (2), where it was held that the six months' limitation in s. 11 of the Summary Jurisdiction Act, 1848, applied to actions in the county court, brought under the Public Health (London) Act, 1891, s. 11, to recover costs and expenses incurred in and about obtaining and carrying into effect a nuisance order. The last-named decision was questioned in *Blackburn Corporation v. Sanderson* (3), where in the same section of a private Act the corporation were given the option of recovering paying expenses either by a summary proceeding before justices or in the superior Courts or any Court of competent jurisdiction, and it was held that the six months' limitation applied only to a proceeding under the summary jurisdiction, and not to any of the alternative proceedings. In *Tottenham Local Board v. Rowell* (4), as in the present case, the summary remedy was given by an earlier Act of Parliament; in *Mayor of Leeds v. Robshaw* (1) and *Blackburn Corporation v. Sanderson* (3) the remedies were all given by the same section. It is submitted that *Tottenham Local Board v. Rowell* (4) was well decided, and that it governs this case. The Act of 1868 is not incorporated in that of 1907.

[BUCKLEY L.J. Then the latter part of your claim, that as to the last two quarters (both remedies being given by the same Act), is within *Blackburn Corporation v. Sanderson*. (3)]

It would seem so. [They also cited *Bolton Corporation v. Scott*. (5)]

Clavell Salter, K.C. (*Ross-Brown* with him), for the respondents. The question as to the first six quarters (which is really all that is in dispute) depends on s. 21 of the Waterworks Clauses Act, 1863, which gives the undertakers power to recover water rates in any Court of competent jurisdiction. The water company has gone to a Court of competent jurisdiction. *Tottenham Local Board v. Rowell* (4) does not lay down any principle that would compel the Court to construe the section as they are

(1) (1887) 51 J. P. 441.

(2) [1896] 2 Q. B. 278.

(3) [1902] 1 K. B. 794.

(4) 1 Ex. D. 514.

(5) (1913) 77 J. P. 193; 108 L. T.

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asked to do by the appellant. In that case the earlier Act said that all proceedings for the recovery of water rates were to be taken before justices; then came the later Act, which, while leaving the larger matters still to justices, said that proceedings for the recovery of rates not exceeding 20*l.* might at the option of the undertakers be taken in the county court, as if the demand was a debt. In that case the argumentum ad absurdum undoubtedly appealed to the Court. These remedies are cumulative as well as alternative. Sect. 21 is an enabling section passed to assist water undertakers in the recovery of what is due to them, and, having regard to the nature and structure of the section, it is contrary to its structure to read into it an exceedingly important and unusual limitation. The undertakers go to the county court with the ordinary incidents of county court jurisdiction. [He also cited *East London Waterworks Co. v. Kellerman*. (1)]

Macmorran, K.C., in reply.

VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the judgment of the Divisional Court reversing the decision of the Westminster County Court, in which in an action to recover eight quarters of the water rate for water formerly supplied by the Lambeth Waterworks Company, whose undertaking was by the Metropolis Water Act, 1902, transferred to and vested in the plaintiffs, the Metropolitan Water Board, the county court judge held that the effect of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 74 and 85, the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145, and the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, was to bar the claim at the end of six months after it arose, and gave judgment for the defendant.

The real question in dispute in this case is whether the principle of *Tottenham Local Board v. Rowell* (2) applies in this case. In that case it was held by the Court of Appeal, consisting of James and Mellish L.JJ., Baggallay J.A., and Quain J., that the limitation respecting summary proceedings before justices applied

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(1) [1892] 2 Q. B. 72.

(2) 1 Ex. D. 514.

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to proceedings in the county courts. The Court of Appeal in terms followed the decision of Blackburn and Field JJ. in *West Ham Local Board v. Maddams* (1) that the six months' limitation under 11 & 12 Vict. c. 43, s. 11, an Act entitled "An Act to facilitate the performance of the duties of justices of the peace with respect to summary convictions and orders," applied to all such proceedings whether before justices or in the county court.

By s. 129 of the Public Health Act, 1848, recovery in a summary manner means recovery before two justices, and the six months' limitation applied.

It was not until 1861 that the Local Government Amendment Act (24 & 25 Vict. c. 61, s. 24), enabled at the option of the local board proceedings to be taken in the county court for recovery of demands below 20*l.* which local boards were then empowered by law to recover in a summary manner as if such demands were debts within the cognizance of such Courts. In *Tottenham Local Board v. Rowell* (2) it was pointed out by Mr. Manisty, K.C., and Mr. Kelly, for the defendant, that the argument for the plaintiff involved the absurdity that a demand below 20*l.* might be recovered in a county court at any time within six years, but that a demand above that sum which could be enforced only before two justices is recoverable only within six months.

For myself I wish to say that I have no doubt but that the object of the Legislature in fixing the six months' limitation where the claim was small, that is below 20*l.*, was that people of small means should not be harassed by claims of local bodies for a long period such as six years, but that such small claims should be disposed of promptly.

James L.J. in *Tottenham Local Board v. Rowell* (2) says: "The first intention was that the claim by local boards should be recovered in a summary manner before justices within six months, and by one of the provisions in a subsequent Act an option is given to proceed in the county court. So long as the claim can be enforced before justices it may be sued for in the county court: but when the six months have gone by the

(1) 1 Ex. D. 516.

(2) 1 Ex. D. 514.

jurisdiction of justices is clearly at an end, and therefore no alternative remedy can exist." Mellish L.J. says: "We ought not to construe this section in this manner, which certainly seems unreasonable. What the Legislature said was that proceedings for demands below 20*l.* might, at the option of the local board, be taken in the county court. It is right to construe these words as meaning that, as long as the right to proceed before justices existed, the right to sue in the county court remained, for then an option might be exercised by the local board. But when the six months had elapsed, the right to proceed before justices was gone, and therefore no option could be exercised and the right to sue in the county court was at an end."

In the case of *Mayor of Leeds v. Robshaw* (1) A. L. Smith J. in delivering the judgment of the Court said: "The cases of the *West Ham Local Board v. Maddams* (2) and the *Tottenham Local Board v. Rowell* (3) . . . were decided upon s. 24 of the Local Government Act, c. 61," and proceeds to difference those cases from the case of *Mayor of Leeds v. Robshaw* (1) on the ground that "in the Act of 1877, which was the first Act as applicable to Leeds, in which a remedy was given by way of summary proceedings (see s. 96), one year was the limit given for such proceedings, and by the same Act, s. 109, where it provided for an action being brought by way of debt upon the statute, no limit is mentioned or prescribed. In the face of these two sections how can it be said that the limitation is the same? In the one the statute says it shall be one year, in the other it says nothing about limit at all; but as it seems to me, it leaves the law where it was before, viz., as to the limit within which an action of debt upon a statute had to be brought."

The next case cited is *East London Waterworks v. Kellerman* (4), and it decides that the effect of 50 & 51 Vict. c. 21, s. 4 is that the purchaser of the freehold of a dwelling-house is liable to a personal action at the suit of the waterworks company to recover arrears of water rate which accrued due before the date of the purchase.

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(1) 51 J. P. 441.

(2) 1 Ex. D. 516, n.

(3) 1 Ex. D. 514.

(4) [1892] 2 Q. B. 72.

C. A. The next case is *Vestry of Hammersmith v. Lowenfeld*. (1)
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reconcile this case entirely with some of the cases later than the *Tottenham Case* (2) which I have cited, but the ground of the decision was that it could not be distinguished from the *Tottenham Case*. (2) I may mention here that Stirling L.J. in his judgment in the case in 1902, which I am just about to mention, points out that he thinks that this case before Cave and Wills JJ. is of doubtful authority.

The next case is *Mayor of Blackburn v. Sanderson*. (3) That was a case in which it was held that, notwithstanding the lapse of the six months as provided in the Act relating to the summary jurisdiction of justices and the decision in *Tottenham Local Board v. Rowell* (2), the six months' limitation applied only to proceedings under the summary jurisdiction and not to any alternative proceedings, and that the action was therefore not out of time. I delivered the judgment in that case myself, but I never like to read from my own judgment, and I do not propose to do so now, but I do say at the end of it one matter which is perhaps worth mentioning: "I have only to add that, in my judgment, if you find in an Act of Parliament the power to take the remedy in divers Courts, that remedy will, in each Court, be subject to the *lex fori* of that Court, and the *lex fori* includes the limitation of actions, which goes to the remedy and not to the right. I think, therefore, that this appeal must be allowed." There is the judgment also of Stirling L.J. and Cozens-Hardy L.J., now Master of the Rolls. I do not think I need read the case at length, but it is a case which recognizes and in no way differs from the decision in *Tottenham Local Board v. Rowell* (2) of James and Mellish L.JJ. There is no reason, in my opinion, why that case should be treated otherwise than as a case of perfect unanimity. The fact is that if you look at the cases one after the other you will find that most of the cases turn upon a mere question of sequence in time of the Acts of Parliament. In *Tottenham Local Board v. Rowell* (2), the first Act of Parliament that you have to deal with is the Act which

(1) [1896] 2 Q. B. 278.

(2) 1 Ex. D. 514.

(3) [1902] 1 K. B. 794.

gave the justices the power by summary proceedings to deal with certain claims, and everything subsequent to that which is allowed by way of option to the public authority, the local board, or otherwise, is taken to really be governed by the first statute which gave the bar. In the argument before us it was pointed out that this is not the only matter which has to be taken into consideration when one is asking oneself whether the ordinary Statute of Limitations, the six years statute, applies or whether it does not apply. I have already read the passage from the judgment of A. L. Smith J., but I may point out that one of the differences which has been recognized as differencing cases from the decision in the *Tottenham Case* (1) is that in the *Tottenham Case* (1) you had two statutes. In some of these cases you have only one statute, and the distinction is drawn between the inference that ought to be drawn in cases where you have one statute which is the foundation of the jurisdiction, and then a subsequent statute which deals with that subject-matter, and cases where you get the jurisdiction and the remedy both in one Act. Under those circumstances I do not think it is necessary myself to go into the antecedent law any further than I have done. At the same time I think that no one can read the case of *Blackburn Corporation v. Sanderson* (2), to which I have already referred, without seeing that in that case the various reasons are gone through shewing how the *Tottenham Case* (1) is properly to be differenced.

I wish at once to mention that the subject-matter that we have to deal with here has been very much limited. The decision that has been given by the Divisional Court applies not only to certain arrears of rates, but applies also to future rates. In point of number the claims here in respect of the past rates are six, I think, and in respect of the new rates, two, but of course the matters involved in the past rates are of very small importance, and the matter involved in the future rates is of great importance; and Mr. Macmorran in the course of the argument had a point put to him by Buckley L.J., and he had to admit, and did admit, that he could not in argument get over the objection taken with regard really to the future rates by Buckley L.J., the objection being *inter alia* that the whole matter there

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(1) 1 Ex. D. 514.

(2) [1902] 1 K. B. 794.

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was contained in one Act of Parliament, both the power to charge the rate and the recovery of the rate, and not by a succession of statutes as was the case in the *Tottenham Case*. (1)

Now, dealing with the past rates, the arrears, I confess that I have rather more doubt, although I come to the conclusion that even in that case the *Tottenham Case* (1) cannot apply, and for reasons which I am now going to give. The Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21, provides that "if any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act they may recover the same with costs in any Court of competent jurisdiction and their remedy under the present section shall be in addition to their other remedies for the recovery thereof." Those words "in addition to," construed in one way and perhaps the natural way, seem to exclude the point of the *Tottenham Case* (1) altogether. Of course the words might be otherwise read; "shall be in addition to" does not necessarily mean "shall be in addition to" in the sense which is inconsistent with the *Tottenham Case* (1), but on the whole I have come to the conclusion that these words "shall be in addition to their other remedies for the recovery thereof" do give to every Court of competent jurisdiction a right to deal with these matters. Under those circumstances it seems to me that even as to the arrears of rates the *Tottenham* decision cannot apply.

I did suggest myself in the course of the argument this question, but I got no very satisfactory answer from either side: When you come to construe the words "in addition to their other remedies," what is intended by those words? Here are three different remedies given, different remedies in different Courts with different jurisdiction. May you take your shot in the first one, and go before the justices and have your order refused? May you then go to a civil Court with jurisdiction, say the county court, and be defeated there, and may you then go on to another Court which has jurisdiction in the matter? I make these observations because in the case which I do not propose to deal with at length, *Mayor of Bolton v. Scott* (2), the words used are that the remedies are cumulative. I have not got to decide the matter, but I should hesitate a long time before I could bring

(1) 1 Ex. D. 514.

(2) 77 J. P. 193; 108 L. T. 406.

myself to hold that the remedies were cumulative in the sense that you might try them one after the other. Of course it is not unknown in some matters to go from Court to Court without any appeal. You can do so on a habeas clearly. One used to see, when the Common Law Courts were all close together at Westminster, the counsel begin at one Court and then go next door and try there, and then to the third Court, applying to the King's Bench, Common Pleas, and Exchequer, one by one. I should hesitate to say that that was the intention, but having said this, I have only to say that the decision of the Divisional Court was right, and that this appeal must be dismissed.

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BUCKLEY L.J. read the following judgment :—If by statute the remedy to enforce a certain right can be sought only in a defined jurisdiction and within a defined limited time, then except in that jurisdiction and within that time the right cannot be enforced. After that time has elapsed the right remains but the remedy is gone. If a subsequent statute provides that the right may at the option of the plaintiff be enforced alternatively in another jurisdiction, it is a question of construction upon the words of the statute whether in the case where the remedy in the first jurisdiction has expired by lapse of time that in the second jurisdiction has expired also. In *Tottenham Local Board v. Rowell* (1) the question was as to the construction of s. 24 of the Local Government Act (1858) Amendment Act, 1861. That section was so expressed as by the word “option” to convey that the proceedings which were there mentioned must be proceedings which could at the option of the local board be taken either in the jurisdiction originally named or in the county court, the jurisdiction subsequently authorized. If by effluxion of time there was no possibility of taking the former there were not two proceedings as between which to exercise an option. It resulted that if the former had elapsed by effluxion of time the latter had become impossible. Further, a construction to the contrary effect would in that case have resulted in holding that as regards demands above 20*l.* there would be a limit of time and as regards demands below 20*l.* there would not—a consideration which leant

(1) 1 Ex. D. 514.

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against a construction which would have resulted in so anomalous a state of things. It was upon reasoning such as the above and upon the construction of that particular section that the Court in that case held that the limit of time before the justices applied to the proceedings in the county court. The decision so far as I know has never been questioned, and the reasoning on which it is founded seems to me incapable of successful attack. But in common with every decision upon mere construction the application of the case is exceedingly limited. In *Mayor of Leeds v. Robshaw* (1) and *Blackburn Corporation v. Sanderson* (2) there was no section such as s. 24 of the Act of 1861, and both remedies were given by one Act. The decisions of this Court were that the limit of time before the justices did not apply to proceedings in the county court or the High Court. In the case before us both remedies are given by one Act as regards the last two quarters. For the enactments as to the different jurisdictions which may enforce the right are all contained in one Act, namely, the Metropolitan Water Board (Charges) Act, 1907, the one in s. 8 and the other in s. 33. As regards the last two quarters, therefore, in the present case the question is expressly covered by previous decisions of this Court, and the appeal must fail irrespective of the grounds presently assigned as to the first six quarters—grounds which apply equally to the last two quarters.

As regards the first six quarters the matter stands as follows: Liability is imposed upon the defendant by s. 4 of the Act of 1887. It is a statute whose effect is to make the amount recoverable from the owner "in the same manner as water rates may by law be recovered." The liability, therefore, is imposed it is true by only one statute, but it is done by importing successive statutes to which I go on to refer: and enforcement against the owner must be made as provided by those successive statutes, whatever be their true construction. So that as regards this part of the case it comes to a question of proper construction of successive statutes and not of one statute. The successive statutes are as follows: By the Waterworks Clauses Act, 1847, s. 74, the right is given in the facts of this case to recover the rate in the same manner as any damages, for the recovery of which no special

(1) 51 J. P. 441.

(2) [1902] 1 K. B. 794.

provision is made, are recoverable by this or the special Act. That sends me on to s. 85, which provides that in this case, the relevant case, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for shall be incorporated with this and the special Act. I then have to refer to the Act of 1845 and I find in s. 140 of the Railways Clauses Consolidation Act, 1845, that "in all cases where any damages, costs or expenses are by this or the special Act or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices." So that in the relevant case it is for two justices to determine the matter. Then, by s. 11 of the Summary Jurisdiction Act, 1848, the complaint shall be made and information laid within six calendar months from the time when the matter of such complaint or information respectively arose. So that after working through three or four Acts of Parliament the short conclusion which I come to is plain, that in the relevant case the remedy to enforce this right is before two justices within six months. There it begins and there it ends so far. Then I come to the statute which creates the other right—I am not going to call it the alternative right because it is not alternative—it is other. It is s. 21 of the Waterworks Clauses Act, 1863, and that provides that "If any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act they may recover the same with costs in any Court of competent jurisdiction, and their remedy under the present section shall be in addition to their other remedies for the recovery thereof." Now, it is plain from that language that this new remedy which is being given is additional. It is not expressed in any way to be alternative. There is nothing like s. 24 of the Local Government Act, 1861. It is said that those concluding words "the remedies shall be in addition" are surplusage because the earlier part of the section had created a certain right. That right was new, and therefore would be additional. That is true, but I do not think it is exhaustive. The latter part of the clause may have two effects, or either one of two effects; it may mean

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substantively and affirmatively expressly to say "Mark you, this is not alternative, but additional"—I think that is very pertinent to this case. Or it may mean this: the previous remedy is not to be taken away: this is to be additional to it: the other remedy is to remain, but this is an additional remedy. Which-ever way you take it it is additional. Now, being additional, what is it? It is a right to recover a sum of money with costs in any Court of competent jurisdiction. Where are the words that say that a Court of competent jurisdiction is to govern itself by the limit of time which would prevail if the proceedings were before two justices. There are none. There is nothing to bring the case in the neighbourhood of *Tottenham Local Board v. Rowell*. (1) I have here a substantive enactment that a particular right may be enforced in a particular Court with no words limiting the time within which the jurisdiction of that Court may be enforced. No doubt the Statute of Limitations, which is of general application, would have effect, that is to say, after six years you could not sue, but there is nothing here to introduce the idea that the limit of six months before the justices is to be the limit of time in the High Court or the county court.

I ought to add that although I have gone into the question of several as distinguished from one statute, that is in my opinion of no importance. The question is one of construction of the language of the Legislature, whether it be contained in one statute or in successive statutes. It is here contained in successive statutes, but had it been in one I should have been of the same opinion, that is to say, if the words of the Waterworks Clauses Act, 1863, had been found in the Act which gave the jurisdiction to the justices for six months, I should still have been of opinion that in the one jurisdiction the limit of six months would, and in the other jurisdiction it would not, apply.

For this reason I think the appeal fails and must be dismissed with costs.

HAMILTON L.J. read the following judgment:—I agree that this appeal fails. The construction of s. 33 of 7 Edw. 7, c. clxxi., and the authority of *Blackburn Corporation v. Sanderson* (2),

(1) 1 Ex. D. 514.

(2) [1902] 1 K. B. 794.

alike conclude the question as to the rate for the last two quarters, which are recoverable under the provisions of the Metropolitan Water Board (Charges) Act, 1907. Sect. 21 of 26 & 27 Vict. c. 93 differs so slightly from the above section that the same result should follow with regard to the rates for the first six quarters. There, too, a remedy is given "in addition to" other remedies, and not "under the same conditions and limitations as apply to" other remedies, and the rate may be "recovered in any Court of competent jurisdiction" simply, and not "provided that proceedings therein be commenced within the time limited for summary proceedings." Were it not for the case of *Tottenham Local Board v. Rowell* (1), the point would hardly be doubtful, but that case is distinguishable. There it was held that the Legislature had empowered the undertakers, if they chose, to do in the county court what they were already entitled to do in a Court of summary jurisdiction, but no more. The Court was influenced, and naturally so, by the circumstance that on any other construction the Legislature must have intended sums over 20*l.* to be sued for within six months, but sums under 20*l.* only within six years. This circumstance is absent here. The further reason was that historically the Legislature had first given the substantive remedy by proceedings before justices, and then incidentally extended it to actions in county courts. This reason does not apply to the Metropolitan Water Board (Charges) Act, 1907, where all the provisions are expressed or incorporated in one enactment, and can only be said to apply to the recovery of the rates for the first six quarters by arguing that s. 4 of the Water Companies (Regulation of Powers) Act, 1887, when providing for the recovery of water rates "in the same manner as water rates may by law be recovered," not merely applies in one enactment several remedies already existing, but also applies them subject to such limitations to be imposed on one by inference from another, as might possibly have been inferred if they had been provided under several successive enactments, as the original remedies for the recovery of water rates were, instead of under one. I think this argument presses the effect of legislation by reference

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C. A. 1913 <hr/> METRO- POLITAN WATER BOARD v. BUNN. <hr/> Hamilton L.J.	too far. It is asked why should the Legislature permit the recovery of the same sum for the same thing only during six months in one Court but during six years in another? The answer may be that, having taken away the remedy, such as it was, by cutting off the water, the Legislature gave the remedy by county court proceedings in lieu of it just because they were not limited so severely as proceedings before justices. But I think there is a better answer: it does not now matter whether the Legislature should or should not have done so, for it clearly has.
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Appeal dismissed.

Solicitor for appellant: *E. H. Riches.*

Solicitor for respondents: *Walter Moon.*

NOTE.—The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 74: “If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than twenty pounds, with the expenses of cutting off the water and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act; or if the rate so due amount to twenty pounds or upwards, the undertakers may recover the same, with the expense of cutting off the water, by action in any Court of competent jurisdiction:—

Sect. 85: “If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act . . . , and such clauses shall apply to the waterworks and to the undertakers respectively, and shall be construed as if the word ‘undertakers’ had been inserted therein instead of the word ‘company.’”

Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 145: “Every penalty or forfeiture imposed by this or the special Act, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before two justices”

Sect. 151 (repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43): “No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special Act, or any Act incorporated therewith, for any offence made cognizable before a justice,

unless the complaint respecting such offence shall have been made before such justice within six months next after the commission of such offence."

Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 21: "If any person refuses or neglects to pay to the undertakers any rate or sum due to them under the special Act, they may recover the same with costs, in any Court of competent jurisdiction; and their remedy under the present section shall be in addition to their other remedies for the recovery thereof."

Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.):—

Sect. 3: "The following parts of the Waterworks Clauses Act, 1847 (namely):—

"The provisions with respect to the supply of water to be furnished by the undertakers (except sections 35 and 36);

"The provisions with respect to the communication pipes to be laid by the inhabitants;

"The provisions with respect to the payment and recovery of the water rates; and

"The provisions with respect to access to the special Act (sections 90 and 91);

shall (so far as the same are applicable for the purposes of and are not varied by or inconsistent with this Act) be incorporated with and form part of this Act and apply as from the commencement of this Act:".

Sect. 33: "If any person refuses or neglects to pay to the Board any rate or sum due to them under this Act or any agreement made thereunder they may recover the same with costs in any Court of competent jurisdiction and their remedy under the present section shall be in addition to their other remedies for the recovery thereof."

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[1912 A. 908.]

Licensing Acts—Application for Renewal of Licence—Reference of Application to Compensation Authority—Refusal of Renewal subject to Compensation—Probability of Bias of Member of Compensation Authority—Application for Mandamus to hear and determine Application—Costs incurred by Authority in opposing Application—Payment out of Compensation Fund—Whether ultra vires—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 21, sub-s. 5.

By s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, it is enacted that "any expenses incurred by the compensation authority in the payment of compensation under this Act, or otherwise in the exercise of their powers or the performance of their duties as compensation authority . . . shall be paid out of the compensation fund . . ."

The holder of the licence of an hotel applied to the licensing justices for a renewal of his licence. The application was referred by the licensing justices to the compensation authority. The compensation authority decided to refuse the renewal subject to the payment of compensation. Rules nisi for a writ of mandamus to the compensation authority to hear and determine the application according to law and for a writ of prohibition prohibiting them from acting upon their decision were obtained by the licensee on the ground that there was a probability of bias on the part of one member of the compensation authority. On the return of the rules the compensation authority appeared by counsel and shewed cause. The rules were made absolute. A resolution was afterwards passed by the compensation authority that the costs incurred by the compensation authority in appearing to shew cause against the rules should be paid out of the compensation fund. The costs were incurred in good faith and reasonably.

In an action brought by the Attorney-General upon the relation of the owners of the premises against those members of the compensation authority who caused the payment to be made, for a declaration that the payment was not authorized by the Act of 1910 and was illegal, and claiming that the defendants should repay the amount to the compensation fund:—

Held, that the payment was not ultra vires, inasmuch as s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, authorized the payment out of the compensation fund of any expenses incurred by the compensation authority in the exercise of their powers or performance of their duties as compensation authority, and it was within their powers and duties to endeavour to support, although unsuccessfully, the validity of their decision as compensation authority.

Action brought by the Attorney-General, on the relation of Samuel Webster & Sons, Limited, against certain members of

the compensation authority of the county borough of Halifax, claiming a declaration that the payment made or caused to be made by the defendants out of the compensation fund of that county borough of certain sums amounting to 144*l.* 9*s.* 4*d.* was not authorized by the Licensing (Consolidation) Act, 1910, and was illegal; the plaintiff further claimed an order that the defendants should repay that amount to the compensation fund.

On July 14, 1911, an application was made to the compensation authority for the county borough of Halifax on behalf of one Robinson, the holder of the licence of the Malt Shovel Hotel, Halifax (an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910), and the relators Samuel Webster & Sons, Limited, the owners of the premises, for a renewal of his licence, the matter having been referred to the compensation authority by the licensing justices under s. 19 of the Act. The compensation authority in Halifax were the whole body of licensing justices. The compensation authority were equally divided in opinion on the matter, and it stood over till the meeting of September 27, 1911, at which the mayor announced that the authority had decided to refuse the renewal subject to the payment of compensation. One of the justices, Mr. Riley, added that the decision was by "six votes to five." The next day there appeared in a local newspaper a letter from Mr. Riley giving the names of those members of the compensation authority who voted for and those who voted against the renewal. The names of the members included that of Mr. Whiteley. In the next day's paper the following letter, written by Mr. Whiteley, appeared:—

"Allow me to protest most emphatically against the action of Mr. J. T. Riley in placing my name amongst those who voted for the retaining of the licence of the Malt Shovel Hotel. I should be nothing less than a traitor, considering the position I hold, if I had voted as he states in his letter. I did not vote for its retaining, but for its refusal. . . ."

Mr. Whiteley had been for many years secretary of a society of Rechabites, and in that capacity had to sign the following declaration:—"I hereby declare that I will abstain from all intoxicating liquors. . . . I will not engage in the traffic in them,

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but in all possible ways will discountenance the use, manufacture, and sale of them. . . .” On learning these facts, Robinson, the licensee, moved the Divisional Court for rules nisi for a writ of mandamus directed to the compensation authority to hear the application according to law, on the ground that that tribunal was improperly or illegally constituted, and that there was a likelihood of bias on the part of Mr. Whiteley, and also for a writ of prohibition prohibiting the compensation authority from acting upon their decision. The rules were refused by the Divisional Court, but the Court of Appeal, on January 12, 1912, granted rules nisi for a mandamus and prohibition.

On the return of the rules the compensation authority appeared by counsel and shewed cause, and an affidavit was made by the mayor, who stated that Mr. Whiteley had not shewn any bias. Mr. Whiteley also made an affidavit, in which he explained that when he used the expression “I should be nothing less than a traitor, considering the position I hold, if I had voted as he states in his letter,” he referred solely to his position as a justice of the peace. The Court of Appeal (Kennedy L.J. dissenting) made the rules absolute on the ground that the circumstances were such as to point to probability of bias on the part of Mr. Whiteley. On March 20, 1912, a meeting of the compensation authority was held, the defendants being present. A resolution was passed that the costs incurred by the compensation authority in appearing to shew cause against the rules, amounting to 144*l.* 9*s.* 4*d.*, should be paid out of the compensation fund; and in pursuance of the resolution the costs were paid. The plaintiff’s case was that that payment was ultra vires. Sect. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, provides that “any expenses incurred by the compensation authority in the payment of compensation under this Act, or otherwise in the exercise of their powers or the performance of their duties as compensation authority . . . shall be paid out of the compensation fund, and the compensation authority, in the exercise of their powers, shall have regard to the funds available for the purpose.”

By his statement of claim the plaintiff alleged (inter alia) that the “costs are not expenses incurred by the said authority in the exercise of their powers or the performance of their duties as

such authority within the meaning of the said Act and the payment of the" sum "was not authorized thereby and was illegal and the said" sum "ought to be restored by the defendants to the said fund."

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By paragraph 1 of the defendants' defence they admitted that they made or caused to be made the payment, and by paragraph 2 they alleged that the sum "of 144*l.* 9*s.* 4*d.* represented expenses incurred by the compensation authority in the exercise of their powers or alternatively in the performance of their duties, and the said payment was authorized and legal by and under s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910."

Paragraph 3. "Alternatively the said payment was for costs properly incurred by the said compensation authority in defending the proceedings in the statement of claim mentioned as to which the said authority was, under the general law and apart from the above mentioned section, to be indemnified out of the funds under their control."

J. A. Compston, K.C., for the plaintiffs. It is clear from the language of s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, upon which the plaintiffs rely, that any power given to the compensation authority to expend money is to be exercised having regard to the funds available for that purpose, and by sub-s. 6, if the fund is insufficient, the authority may, with the consent of the Secretary of State, borrow, in accordance with rules made under the Act, on the security of the compensation fund, but only for the purpose of paying any compensation which is payable under the Act. So that the expenditure which may be incurred is strictly limited. The question is whether the expenses which were incurred by the compensation authority in the present case were expenses incurred in the exercise of their powers or the performance of their duties. The powers of the compensation authority under the Act of 1910 are shewn by s. 5, which is purely a directory provision as to dividing the area, and ss. 18, 19, 20, and 21.

The costs incurred by the compensation authority in the present case are not an expenditure by them in the performance or exercise of their duties or powers. The authority was unconcerned

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with the question raised by the rules nisi and had no reason whatever to shew cause against them. It is true the rules were addressed to them just as a rule for a certiorari to quash an order made by justices is addressed to the justices as well as to the prosecutor, but the prosecutor is the only person who appears upon the argument of the rule. Although it is their duty to make an order, and to use their judgment in making it, it is not their further duty to support it when made. If an applicant obtained a rule nisi for mandamus to hear and determine on an affidavit stating that he had not been heard although in fact he had been heard, it would be no part of their duty as the compensation authority to appear upon the argument of the rule. All they ought to do is to make an affidavit under the Review of Justices' Decisions Act, 1872 (35 & 36 Vict. c. 26). If in the present case the compensation authority had made the affidavit and sent it by post to the Master it would have been read and considered by the Court. The justices cannot have costs given against them if their decision is upset; therefore they are in no sort of peril, and they need not have done anything. When the Court of Appeal made the rules absolute, all the justices had to do was to rehear the case, and there would be no reflection upon them because they reheard it. To appear before the Court of Appeal was entirely unreasonable. Where trustees are necessarily made respondents to an appeal, it is improper for them to appear where there are no allegations against them. It was necessary to obtain a rule addressed to the compensation authority because they made the order complained of, but they had no interest in the matter. The only person who should have appeared was Mr. Whiteley, and no costs incurred by him could be costs expended in the exercise or performance of the duties imposed upon the compensation authority. The fact that he had unfortunately, without the knowledge of his colleagues, placed himself in a position open to suspicion imposed no duty on them to defend him. They therefore had no justification for spending the sum of 14*l.* 9*s.* 4*d.* out of the fund, which is provided for a special purpose.

The provisions of the Licensing (Consolidation) Act, 1910, must be strictly construed with regard to the provisions it

contains as to the compensation fund, which is provided for a public purpose, namely, to enable compensation to be paid in the public interest in order that licences which are not required may be extinguished. The words are strictly limited to the "performance of their duties as compensation authority." These are not expenses arising out of the performance of their duties, but out of the non-performance of their duties, or because they performed them in a non-legal manner. The decision in *Tynemouth Corporation v. Attorney-General* (1) illustrates the principle that a provision of the kind contained in s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, has to be very carefully scrutinized, and that no payments are to be allowed unless they can be strictly shewn to be within it.

The compensation authority has no general right of indemnity apart from the Act of 1910. The expenditure is not costs and expenses which the compensation authority were entitled to pay out of the compensation fund. [The definition of "compensation authority" contained in r. 2, clause 1, of the Licensing Rules, 1910, and rr. 3, 33, 49, 50 and 60 were also referred to.]

M. Shearman, K.C., Bruce Williamson, and G. A. H. Branson, for the defendants. The question turns upon the true construction of s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910. A reasonable construction must be placed upon its language and upon the word "duties" contained in it. Where the propriety of acts done in performance of a duty by a public body is attacked the members of it do not incur the risk, if they fail in upholding their acts, of having to pay the costs out of their own pocket: *Reg. v. Staffordshire Justices* (2); *Rex v. Inhabitants of Essex* (3); *Rex v. Commissioners of Sewers for the Tower Hamlets*. (4)

The limitation is that the fund cannot be legally used in payment of expenses incurred in deciding a dispute between one member and another.

If the compensation authority had determined to incur the costs in order to defend Mr. Whiteley, and not in the interest of the county, different considerations might arise, but the authorities shew that the defendants were justified in paying

(1) [1899] A. C. 293.

(3) (1792) 4 T. R. 591.

(2) [1898] 2 Q. B. 231.

(4) (1830) 1 B. & Ad. 232.

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the expenses of performing their duty. The expenses were incurred by the compensation authority in defending their order although they defended it unsuccessfully. The judgment of Lord Denman in *Reg. v. Leeds Corporation* (1) shews that funds must not be expended in deciding whether A. or B. is a member of a corporation, because that is a dispute between individuals, but when the corporation as a body is attacked they may lawfully employ the corporation funds to repel it.

The decisions in *Reg. v. Lichfield Town Council* (2) and *Lewis v. Rochester Corporation* (3) shew that public bodies are guardians of the funds entrusted to them, and, if they act reasonably, are entitled to have their costs paid out of the funds. Those authorities shew that if the compensation authority acted reasonably and in defence of their order they are within the words "the performance of their duties as compensation authority," and the same principle is illustrated in *Attorney-General v. Mayor of Brecon*. (4)

The decision in *Reg. v. Tamworth Corporation* (5) shews that, although the compensation authority failed on the argument of the rules nisi, they are in the position of trustees who have a fund under their control which they have to administer. In those circumstances it was their duty to take any proper and reasonable steps to defend acts honestly and bona fide done in the course of their administration of the fund, and they were entitled to take their costs incurred in doing so out of the fund. There was a duty upon them to incur those costs, and they would not have acted properly if they had not incurred them. [The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and the Local Government Act, 1888 (51 & 52 Vict. c. 41), were also referred to.]

J. A. Compston, K.C., in reply. The authorities relied upon on behalf of the defendants deal either with county or borough government and are not in point. The question is what is the meaning of the particular provision contained in s. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910? If it had been the intention

(1) (1843) 4 Q. B. 796.

(3) (1860) 9 C. B. (N.S.) 401.

(2) (1847) 16 L. J. (Q.B.) 333.

(4) (1878) 10 Ch. D. 204.

(5) (1868) 19 L. T. 433.

of the Legislature that all the costs of the compensation authority properly incurred in such a matter as this were to be paid out of the compensation fund it could easily have said so in plain language, but it has limited the expenses to those incurred in the performance and execution of the powers and duties imposed upon them by the Act. *Reg. v. Staffordshire Justices* (1) is not in point. That case was decided in 1898, before the passing of the Licensing (Consolidation) Act, 1910, by s. 32 of which provision is made for the costs of justices respondents to an appeal. If they do not recover them from the unsuccessful appellant they are to be paid out of the county fund. In *Rex v. Inhabitants of Essex* (2) Lord Kenyon C.J. was simply declaring what was the common law. It was not an act but a decision of the compensation authority which was called into question in the present case.

As to the decisions on questions of the removal of paupers, it is to the pecuniary benefit of a county that a pauper should be removed out of its boundary and sent into the union of another county, and therefore it would be perfectly right that any question as to the propriety of an order for removal which had to be defended should be defended at the cost of the county which would benefit. As to *Rex v. Commissioners of Sewers for the Tower Hamlets* (3), if in the present case there had been (as there was in that case) an attack upon the decision of the whole of the authority, there would have been a difficulty in contending that the cost of defending it should not come out of the fund, because it would have been their duty to place before the Court the circumstances which had induced them to make the order they did, and to convince the Court if possible that they had come to the right conclusion; but even then they would have had no right to brief counsel to appear, but merely to file an affidavit. No decision of the whole body was questioned in the present case. The decision in *Reg. v. Leeds Corporation* (4) shews that if there is an attack upon the corporation as a body the borough fund must defend the body, but where it is an attack upon the individual and not against the body, though in form

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(1) [1898] 2 Q. B. 231.

(3) 1 B. & Ad. 232.

(2) 4 T. R. 591.

(4) 4 Q. B. 796.

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it may be against the body, it is not so. Here the attack from first to last was upon Mr. Whiteley and upon no one else. In *Reg. v. Lichfield Town Council* (1) the act called into question was the act of the whole corporation, and all that that case goes to shew is what was the common law, and the same point was decided in *Lewis v. Rochester Corporation*. (2)

As to the contention that the compensation authority are trustees of the fund, the decision in *Carroll v. Graham* (3) shews that there is no right to spend public funds or trust funds in defending the action of one of the trustees who has misconducted himself. In the present case the whole question turned on the position of Mr. Whiteley. No decisions upon different statutes or as to the common law before the passing of the Licensing (Consolidation) Act, 1910, can affect the construction of that statute.

Cur. adv. vult.

May 5. The following judgment was read by

SCRUTTON J. In this case the Attorney-General on the relation of Samuel Webster & Sons, Limited, a firm of brewers, questions the application by the defendants, who are justices for the county borough of Halifax, and members of the compensation authority for that borough, of the compensation fund for that borough in defraying the costs of the compensation authority in unsuccessfully resisting an application in effect to set aside one of their decisions as compensation authority on the ground that there was a probability of bias in one of the members adjudicating.

The question arose in the following way: Licensing justices can refuse renewal of licences without compensation on grounds involving some kind of personal misconduct. If other grounds are raised, as that the particular house is not wanted, they must refer the question of renewal to the compensation authority, who may refuse the renewal, but if so must grant compensation out of a fund called the compensation fund, raised by an annual levy on the holders of existing licences. Of this fund the compensation

(1) 16 L. J. (Q.B.) 333.

(2) 9 C. B. (N.S.) 401.

(3) [1905] 1 Ch. 478.

authority are the trustees, and in considering the necessity for renewal and administering the fund they are performing a public duty. The licensing justices referred to the Halifax compensation authority the question of the renewal of the licence of the Malt Shovel public-house, owned by the relators. The compensation authority by a majority refused to renew, one of the majority being a Mr. Whiteley. After the hearing Mr. Whiteley wrote a letter on the subject, which the relators contended shewed that he held such strong temperance views that there was a probability of bias on his part. They accordingly applied to the King's Bench Division for a rule nisi for a mandamus to hear and determine on that ground, which was refused by the Divisional Court, but granted by the Court of Appeal. On the granting of this rule nisi, the compensation authority considered the matter and, having satisfied themselves that their decision was in order and not vitiated by the cause alleged, shewed cause against the rule being made absolute. On affidavits being filed, the Court of Appeal were divided in opinion, the majority thinking there was a probability of bias, the minority dissenting, and the rule was made absolute. The compensation authority then ordered their costs to be defrayed out of the compensation fund, and the relators bring this action to question that order.

Sect. 21, sub-s. 5, of the Licensing (Consolidation) Act, 1910, authorizes the payment out of the compensation fund of any expenses incurred in the exercise of their powers or performance of their duties as compensation authority, and the question in this case is whether it is within those powers and duties to endeavour to support, though unsuccessfully, the validity of one of their decisions as compensation authority. I find that the costs were incurred in good faith and reasonably. The latter finding is supported by the fact that three of my brethren have thought that the contention of the defendants was in fact correct, but I notice that Buller J. in *Rex v. Inhabitants of Essex* (1) seems to have thought that the question of reasonableness was for the public authority itself.

I was referred to a large number of authorities, which I have

(1) 4 T. R. 591.

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carefully considered. It is true that there is no express provision in the Licensing (Consolidation) Act, 1910, authorizing the compensation authority to defend the validity of its decisions, but neither is there any express power authorizing it to protect and preserve the compensation fund. On this point I refer to and rely on the judgment of Sir George Jessel M.R. in *Attorney-General v. Mayor of Brecon* (1), to the effect that the ordinary rights of corporations, and still more of public authorities, to protect their funds, their existence, and the exercise of their rights and duties must be implied without express words. In my opinion the principle laid down in *Rex v. Inhabitants of Essex* (2) and *Rex v. Commissioners of Sewers for the Tower Hamlets* (3), and followed in numerous other cases, applies here, and whenever a duty is imposed on a public body and costs incidentally and necessarily arise in reasonably endeavouring to uphold acts done in alleged pursuance of that duty, or in questioning the propriety of acts done to enforce that duty, the public authority may defray such expenses out of its corporate funds. It appears to me a matter of public interest that persons called upon to exercise a public duty, and reasonably incurring expenses in endeavouring to support their acts in purported exercise of that duty, should not be mulcted in their private purse, but should be indemnified from the public funds. Any other course would prevent individuals from undertaking such a public duty, or would tend to prevent the evidence in favour of the validity of acts done in pursuance of a public duty being adequately presented to the Court.

The proceedings must therefore be dismissed with costs.

Judgment for defendants.

Solicitors for plaintiff: *Godden, Son & Holme.*

Solicitors for defendants: *Barrett & Co.*

(1) 10 Ch. D. 204.

(2) 4 T. R. 591.

(3) 1 B. & Ad. 232.

[IN THE COURT OF APPEAL.]

NETTLEINGHAM & CO., LIMITED v. POWELL & CO.

[1912 N. 224.]

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June 5.

Employer and Workman—Action for Indemnity by Employer against Third Party—Workmen's Compensation Rules, 1907, rr. 19, 24—Omission to serve Notice of Claim—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6.

Where a workman has recovered compensation under the Workmen's Compensation Act, 1906, from his employer in respect of an accident which was caused by the negligence of a third party, it is not a condition precedent to the employer's right to maintain an action for indemnity against the third party under s. 6 of that Act that he should have filed and served on the third party a formal notice of his claim under r. 24 of the Workmen's Compensation Rules, 1907.

Decision of Phillimore J. [1913] 1 K. B. 113, affirmed.

APPEAL of the defendants from a decision of Phillimore J., reported [1913] 1 K. B. 113.

The plaintiffs were corn merchants, and the defendants were the owners of the steamship *Norfolk Coast*. On February 18, 1911, the ship was alongside the plaintiffs' wharf at Gravesend discharging a cargo of oil cake in bags on to the wharf. In the course of discharging the bags were put into slings by, amongst others, one John Collyer, a workman in the plaintiffs' employment. The slings were raised from the hold of the ship to be transferred on to the wharf by means of the ship's winch, which was driven and controlled by one of the crew of the ship, a servant of the defendants. Whilst Collyer was engaged in the hold in so unloading he received injuries owing to the negligence of the defendants' winchman, and was thereby totally incapacitated for work. The plaintiffs by agreement with Collyer, who had been earning on an average 30s. per week, paid him as compensation under the Workmen's Compensation Act, 1906, a weekly sum of 15s., and continued to pay him that sum for forty-one weeks. Then, thinking that his incapacity had ceased to be total, they reduced the weekly payment to 7s. 6d., and paid him that sum for nine weeks.

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Collyer, who claimed that his incapacity was still total, commenced arbitration proceedings in the county court for the recovery of further compensation upon that basis. The plaintiffs had some months before the hearing of the arbitration informed the defendants by letter that they intended to claim indemnity under s. 6 of the Workmen's Compensation Act, 1906 (1), but they did not file or serve upon the defendants a formal notice of their claim under rr. 19 and 24 of the Workmen's Compensation Rules, 1907 (2), and the defendants did not appear in the arbitration. At the hearing the judge made an award that the plaintiffs should pay to Collyer a lump sum of 52*l.* 10*s.* for compensation and 22*l.* 10*s.* as his costs in

(1) By the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6, "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof . . . (2.) If the workman has recovered compensation under this Act the person by whom the compensation was paid . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

(2) By r. 19 of the Workmen's Compensation Rules, 1907, "Where a respondent claims to be entitled under section 4 of the Act to indemnity against any person not a party to the arbitration, he shall, ten clear days at least before the day fixed for proceeding with the arbitration, file a notice of his claim, according to the form in the Appendix; and the registrar shall send such notice and deliver it to the respondent, who shall serve the same, together with

a copy of the applicant's request and particulars, and of the notice served on the respondent under rules 14 and 15, upon the person against whom such claim is made"

By r. 24 of the Workmen's Compensation Rules, 1907, "(1.) Where a respondent claims that if compensation is recovered against him he will be entitled under section 6 of the Act, or otherwise than under section 4, to indemnity against any person not a party to the arbitration, he shall file and serve a notice of his claim in accordance with rule 19. (2.) If any person served with a notice under the last preceding paragraph (hereinafter called the third party) desires to dispute the applicant's claim in the arbitration as against the respondent on whose behalf the notice has been given, he must appear before the judge on the day fixed for proceeding with the arbitration . . . ; and in default of his so doing he shall be deemed to admit the validity of any award made against such respondent as to any matter which the judge has jurisdiction to decide in the arbitration as between the applicant and the respondent, whether such award is made by consent or otherwise."

the arbitration. The plaintiffs then brought this action against the defendants to recover 136*l.* 12*s.*, the amount of the expenses to which they had been put by reason of the defendants' negligence. The sum was made up as follows : 30*l.* 15*s.*, compensation for forty-one weeks at 15*s.* per week ; 3*l.* 7*s.* 6*d.*, compensation for nine weeks at 7*s.* 6*d.* per week ; 14*s.* 6*d.*, Collyer's fare to London for medical examination ; 75*l.*, the amount of the award ; 17*l.* 6*s.*, the plaintiffs' costs in the arbitration, and 9*l.* 9*s.* medical fees. The defendants set up by way of defence (*inter alia*) that the plaintiffs were not entitled to maintain the action as they had not served on the defendants a notice of claim in compliance with the rules. Phillimore J. held that the service under r. 24 on the third party of a formal notice of his claim to an indemnity was not a condition precedent to the employers' right to maintain an action for indemnity against the third party under s. 6 of the Act, and gave judgment for the plaintiffs.

The defendants appealed.

Alex. Neilson, for the defendants. The defendants have not complied with the requirements of s. 6 of the Workmen's Compensation Act, 1906, under which alone their right to an indemnity arose. The words "shall be settled by action" in s. 6 mean settled by action in accordance with the rules under the Act. The plaintiffs were bound before commencing their action to serve the notice of claim provided for by r. 24.

[HAMILTON L.J. Your argument seems to involve the contention that the High Court action would be subject to the Workmen's Compensation Rules, and not to the Rules of the High Court.]

It would be narrowing r. 24 very much if one reads into it "if he desires to make him a party to the proceedings in the county court."

Hollis Walker, K.C., and *Harold Morris*, for the plaintiffs, were not called upon.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Phillimore J. is quite right. Rule 24 does not apply to actions in the High Court, but only to proceedings in the county court.

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C. A. BUCKLEY L.J. I agree with the conclusion and the reasonings
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HAMILTON L.J. I agree.

Appeal dismissed.

POWELL
& Co.

Solicitors for appellants: *Holman, Birdwood & Co.*

Solicitors for respondents: *W. Hurd & Son.*

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[IN THE COURT OF APPEAL.]

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April 23.

COMMISSIONERS OF INLAND REVENUE *v.* GRIBBLE
AND OTHERS.

*Revenue—Reversion Duty—“Purchase” of Reversion—Marriage Settlement—
Consideration of Marriage—Finance (1909-10) Act, 1910 (10 Edw. 7,
c. 8), s. 14, sub-s. 1.*

In the year 1888 the freehold reversion expectant on the determination of a lease for ninety-four years from Michaelmas, 1816, was conveyed, subject to the lease, to the trustees of a marriage settlement, before and in consideration of the marriage, upon the trusts thereby declared.

Upon a claim for reversion duty under s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, the trustees claimed exemption under s. 14, sub-s. 1, on the ground that the reversion was purchased before April 30, 1909:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J.; Buckley L.J. dissenting), that the word “purchase” in s. 14, sub-s. 1, was used in the ordinary commercial sense of “buy” and not in the more technical sense of “purchase for valuable consideration,” and that the reversion in question was not exempt from duty.

Decision of Horridge J. [1913] 1 K. B. 220, affirmed.

APPEAL from a decision of Horridge J. (1)

The appellants were the freeholders of a house and together constituted “the lessor” for the purpose of s. 15 of the Finance (1909-10) Act, 1910, and the person to whom the benefit (if any) accrued from or by reason of the determination of the lease of the house for the purpose of reversion duty.

By a lease made in 1817 the house was demised by the predecessors of the appellants to a lessee for a term of ninety-four years from Michaelmas, 1816.

(1) [1913] 1 K. B. 220.

By a conveyance dated August 1, 1888, made in contemplation and consideration of the marriage of F. C. Coxhead and A. B. Gribble, the house was conveyed to trustees in fee simple, subject to the lease, upon trust that the trustees should sell the same and hold the proceeds of sale upon the trusts declared by another indenture of the same date. That other indenture was a settlement made upon the said marriage. It declared that the trustees, who were the same in both indentures, should hold the house and the proceeds of sale thereof and the rents and profits thereof until sale, upon trust to pay the annual income to the wife for life and after her death to the husband for life, and after the death of the survivor upon trust as to the capital for the issue of the marriage and in default of issue for such person, persons and purposes as the wife should by deed or will appoint, and in default of such appointment for the next of kin of the wife.

On September 29, 1910, when the lease of the house expired, the appellants were the trustees of the conveyance and settlement of August, 1888, and the house was vested in them upon the above trusts.

The Commissioners of Inland Revenue made an assessment upon the trustees to reversion duty in respect of the benefit accruing to them by the determination of the lease of the house, under s. 13 of the Finance (1909-10) Act, 1910. The trustees appealed to a referee against the assessment upon the ground that no reversion duty was payable by reason of the provisions of s. 14, sub-s. 1, of the Act. The referee decided that no reversion duty was payable, and the Commissioners appealed.

Horridge J. decided that reversion duty was payable (1), and from that decision the trustees now appealed.

Ryde, K.C., and *Konstam*, for the appellants. Sect. 14 of the Finance (1909-10) Act, 1910, is full of technical words, and the proper construction is that "purchase" is used in a technical meaning and not merely as equivalent to "buy." The respondents say it means "buy," but admitted in the Court below that it might cover a case of exchange. A deed of exchange is regarded as equivalent to a conveyance on sale by s. 73 of the Stamp Act, 1891.

(1) [1913] 1 K. B. 220.

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The principle of the enactment is that the "lessor" should pay a tax for coming into something which he has done nothing to earn, and the exemption was to obviate a possible hardship in the case of recent purchases which would apply equally well to the case of a marriage settlement.

"Purchaser" includes the case of a marriage consideration in s. 74, sub-s. 5, of this Act, and we submit that in s. 14, sub-s. 1, "purchase" is used in the wider sense and covers acquisition for money, money's worth, or other valuable consideration including marriage.

[BUCKLEY L.J. How about a mortgagee? He is legally a purchaser.]

Yes; the case of foreclosure of the reversion is dealt with by s. 14, sub-s. 5, but that applies for all time and not merely to a forty years reversion under sub-s. 1, and has an entirely different object.

Sect. 3, sub-s. 1, of the Finance Act, 1894, and s. 17 of the Succession Duty Act, 1853, afford illustrations where transactions for money or money's worth are mentioned.

If the meaning of the word is confined to "buy," some vested interests will be protected, others not, but the Legislature advisedly used the word "purchase" in the wider sense meaning "acquire for valuable consideration" which would cover marriage, and would work both equality and equity.

Sir John Simon, S.-G., and Tomlin, for the respondents. If the word "purchase" means "purchase for valuable consideration," why should it not receive the full technical meaning in real property law and mean acquisition otherwise than by descent? Sect. 14 is a qualification of the main charging section, s. 13, which is meant to tax unearned increment, but an exception was made in the case of a recent purchaser who had paid full value for a reversion about to fall in, and the case of a surrender or merger was dealt with by s. 3 of the Revenue Act, 1911.

Sect. 39, sub-s. 4, of this Act deals with the payment of reversion duty by a mortgagee, and that shews that although he is a purchaser for value in the technical sense he is not entitled to exemption from s. 13 by virtue of s. 14, sub-s. 1.

[KENNEDY L.J. "Purchaser" in s. 91 of the Bankruptcy Act, 1869, was held to be a "buyer" in the commercial sense in *Ex parte Hillman* (1), referred to in *Hance v. Harding*. (2)]

"Purchase" is also used commercially in s. 7 of the Mortmain and Charitable Uses Act, 1891, and the meaning of "purchase" was discussed in *Philpott v. St. George's Hospital*. (3) It is quite outside the scheme of the Act to say that the relief given by s. 14, sub-s. 1, applies to a case like this.

Ryde, K.C., in reply.

COZENS-HARDY M.R. This appeal raises an important point of construction under the Finance Act, and if I had thought that further consideration would have led to a change of my view I should certainly have desired to consider this case, but having carefully considered it in the course of the argument, I have, speaking for myself, come to the conclusion that *Horridge J.* was right and that the word "purchased" in the section in question means "bought" as in the ordinary relation between a buyer and a seller.

The question turns on s. 14 of the Finance (1909-10) Act, 1910. By s. 13 a new duty called reversion duty is charged on the determination of any lease of land, on the value of the benefit accruing to the lessor. There is a definition of "lessor" in s. 41. "Lessor" includes the person for the time being entitled to the reversion, whether freehold or leasehold, expectant on the determination of the lease; and s. 14 provides a series of exemptions. The only one which is material here is the first: "Where, in the case of a reversion to a lease purchased before the thirtieth day of April nineteen hundred and nine"—which I assume was the day on which the then Chancellor of the Exchequer made his announcement of his intention—"the lease on which the reversion is expectant determines within forty years of the date of the purchase, no reversion duty shall be charged under this Part of this Act on the determination of the lease."

The facts in this case which raise the point are these. There was a lease for a term of ninety-four years from Michaelmas,

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(1) (1879) 10 Ch. D. 622.

(2) (1888) 20 Q. B. D. 732.

(3) (1857) 6 H. L. C. 338, 348.

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1816. At the date of the determination of the lease the reversioners claimed title under a marriage settlement executed within the prescribed period of forty years, and the question is whether the persons claiming under that marriage settlement can be said to have purchased the reversion on the lease within the meaning of this section. In my opinion they cannot. I think that the word "purchased" must not be construed in the technical meaning which the word "purchaser" has in real property law, as a person taking by purchase who does not take by descent, nor does it, I think, mean in any and every case in which in the view of our law there may be a purchaser for valuable consideration.

There is a sense perfectly well recognized in our law in which a marriage settlement is undoubtedly a transaction for valuable consideration, and marriage is often said to be the highest consideration. I cannot bring myself to think that when the Act speaks of a reversion to a lease purchased before that date it means that there may be somebody who, claiming under a marriage settlement, can be said to have purchased that lease. It is altogether contrary to the ordinary meaning of the language, and speaking for myself I cannot see any ground for holding that that means anything more than what, apart from technicalities of real property law, anybody would say the word "purchased" meant.

But it is said, "Oh, what about the case of an exchange? If it is true that exemption is only to be given where there is a transaction of buyer and seller, how about the case of an exchange?" When that case arises I will endeavour to deal with it. All I say is that at present the inclination of my opinion is that exchange, which is a very exceptional transaction, is not within the sub-section. However that may be, I cannot bring myself to believe that persons claiming under a marriage settlement can be said to have purchased the reversion within the meaning of this section.

Then we have had a very interesting discussion on the position of a mortgagee. The position of a mortgagee undoubtedly is a case which deserves consideration. A mortgagee plainly has given consideration, and he has given cash consideration, and he is also a person who is liable to

be charged as a lessor within the meaning of the Act. I think the answer to the reference to the case of a mortgage, if it be necessary to consider it, is that there is an express provision made for the case of a mortgagee, not treating him as a purchaser within s. 14, sub-s. 1, but treating him as a person liable under s. 13 but entitled under s. 39, sub-s. 4, to add to his security the amount which he has had to pay for the reversion duty. That is the general provision applicable to all cases whether within the forty years or not. In s. 14, sub-s. 5, there is a further provision also applicable to all cases where a mortgagee has foreclosed.

I only mention those cases as cases which have deserved consideration and which have been considered. None of those cases satisfies me that we ought to put any other meaning on the word "purchased" in this section than that which is the ordinary and commercial and businesslike meaning of the word, and I decline to incorporate in this section what I have ventured to call the technicalities of real property law.

I think the decision of Horridge J. was right on this ground.

BUCKLEY L.J. This question lies within a small compass, but it is not rendered in any respect the more easy by that consideration. I have found it exceedingly difficult. I have arrived at a conclusion different from that of the Master of the Rolls, and will express, as far as I can, my reasons for that conclusion.

On August 1, 1888, there was subsisting a certain lease which would expire at Michaelmas, 1910. On August 1, 1888, the reversion was conveyed for the consideration of marriage. The question is whether, that conveyance having been made before April 30, 1909, the date mentioned in the section, that conveyance or transaction amounted to one in which that reversion was purchased.

What is the meaning of the word "purchased" in the section? As regards the policy of the section, I conceive that the policy was this. It was familiar in 1910 that there were large dealings in reversions expectant upon leases, dealings by way of purchase, dealings by way of mortgage, dealings of all sorts; it was a large class of business. The intention of this

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section I think was this: If before this Act came into operation a person had for value acquired a reversion upon the footing that having regard to the value of the land and the unexpired period of the term, and so on, it had a certain definite value, and he gave that sum for it, he should not then find himself exposed by the operation of this Act to having to pay this duty, for if so the seller would have received the whole value on the hypothesis that there was not a duty, and the purchaser would have got the reversion subject to reduction by the duty. That I conceive was not regarded as fair. That may be right or wrong, but if that be right, and I think it is right, it seems to me that *prima facie* the meaning of this section must be that where, upon a transaction that can be called a purchase, a person has become the owner of the reversion upon a lease under circumstances when he may be contemplated as having attributed to it a certain value based upon the value of the land and of the unexpired term, he should not find himself saddled with a new duty.

"Purchaser" may, as it seems to me, mean any one of four things. First, it may bear what has been called the vulgar or commercial meaning; purchaser may mean a buyer for money. Secondly, it may include also a person who becomes a purchaser for money's worth, which would include the case of an exchange. Thirdly, it may mean a purchaser for valuable consideration, which need not be money or money's worth, but may be, say, a covenant, or the consideration of marriage. Fourthly, it may bear that which in the language of real property lawyers is its technical meaning, namely, a person who does not take by descent. This last it is unnecessary to consider.

The Solicitor-General affirms that it bears here the first of these meanings and means exclusively a buyer for money. I think not. At any rate I think that the fair meaning and operation of this section are to relieve from the duty the man who has acquired for money's worth, just as much as if he had bought for money. Therefore I certainly do not stop short at a transaction under which he paid money. I think it includes money's worth. I do not see any difference as regards policy between those two transactions, and if the one man ought to be free the other ought

also to be free. That does not carry me the whole length, because I have still to consider the question when money is not given nor money's worth, but value such as a covenant or the consideration of marriage.

I think that this section by the word "purchased" means "acquired for value." I do not know that it lends much assistance to it, but, to my mind, it lends some to bear this in mind—that this same statute was going to impose for the first time *ad valorem* duty upon voluntary conveyances. The *ad valorem* duty was to be paid on the value of the property. But in doing that the statute put into the category of the transactions which were to be relieved a conveyance upon marriage. A conveyance upon marriage does not bear *ad valorem* duty. I suppose that was on grounds of public policy and that it was not thought desirable to tax marriage. Whether a similar consideration applied in this case, of course, is doubtful. But the construction which I place upon the section does make the provision of the section in respect of that particular matter—namely, disposition of property on marriage—similar in the one case and in the other. I read this section as meaning that, in the case of a reversion to a lease acquired for value, not necessarily for money or money's worth, the exemption is to attach in favour of the person sought to be charged.

There is one other consideration. It is a commonplace that in statutes of taxation the imposition of a duty must be in plain terms. It is true that s. 14 is not a section which imposes a duty; it is a section which exempts from duty, but it is equally within the observation which I have made in the sense that the Act of Parliament has only imposed the duty upon such persons as are plainly indicated as being within the class to be charged.

I agree that the point is a difficult one. The conclusion which I have arrived at is that certainly the word "purchaser" here is not confined to "purchaser for money." It is more difficult to say whether it goes beyond "purchaser for money or money's worth," but I myself think that it does go beyond that and extends to "purchaser for value."

For these reasons, in my judgment the appeal ought to be allowed.

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KENNEDY L.J. It is impossible to say that this case is not difficult after the judgment that we have just heard, but I confess I agree entirely with the Master of the Rolls. What we ought to do in this case, it being not free from difficulty, is to choose that which I should say is the natural meaning of a word used in a statute, not specially relating at all to the technicalities of real property law or to conveyancing in particular, but relating to a matter of business, for this is a Finance Act, and therefore using language which is to be read from a business point of view. I feel this so strongly that I can come to no other conclusion but that when a person is told that there shall be an exemption from reversion duty in a certain event, and that event is described as the case of a reversion to a lease purchased before a certain date, and that statement is followed by words that the reversion expectant determines within forty years of the date of the purchase, it is our duty, putting a construction upon that public Act of Parliament passed for commercial or business purposes and relating to business transactions not of a specially technical kind or connected specially with our real property law, to say that "purchased" in the first line of this sub-section and "purchase" in the fourth line mean that which (it needs not a reference to Murray's dictionary or any other dictionary to tell us) everybody to-day means by the words "purchased" and "purchase" in the ordinary language of life. "Purchase" means "buy." When you speak of buying a reversion to a lease there is no noun which corresponds to the verb "buy," so where noun and verb have got to be used in the same sentence it is natural to find that you get the words "date of the purchase" because that is the way in which you express in ordinary language the noun when you want to describe the transaction of buying.

I quite appreciate that there may be cases such as have been argued with much skill by Mr. Ryde before us—Are you going to say that it excludes or includes money's worth? Are you going to say that it includes or excludes cases of barter? I will wait to decide that judicially till the time when the question arises. But if a man tells me in ordinary life "I have just purchased a house," I certainly do not suppose he has been exchanging another house for it. If I say "I have purchased a reversion"

I presume I should be understood to mean “purchased,” and I think, if in ordinary conversation of a business sort I used the expression “I have bought the reversion” and then used the words “I have purchased the reversion,” I should be surprised if it was objected, “Now you are altering your language,” “purchase” may just as well mean obtain by barter or exchange as obtain by payment of money. “Purchase” may not be the most perfect expression that could be used, because to be perfect possibly the word should have been—and this discussion shews it—qualified by the words “for money.” But I think “purchase” in the ordinary sense in the absence of any context to qualify it does mean “buy.” As Sir G. Jessel pointed out in his judgment in the bankruptcy case to which I have referred,—in which there was a strong additional argument in the particular context—in a statute dealing with business matters an ordinary business meaning ought to be given to words, and the ordinary meaning of “purchase” is “buy.”

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COZENS-HARDY M.R. The appeal will be dismissed.

Appeal dismissed.

Solicitors for appellants : *Godden, Holme & Ward.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

R. M.

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DAVIES v. GLAMORGAN COAL COMPANY.

June 24.

Coal Mines—Minimum Wage—Method of ascertaining actual Daily Earnings of Miners—Power of Joint District Board to make Rules as to—Inability of Workman to earn Minimum Wage owing to Circumstances beyond his Control—Rule requiring Notice to Official—Validity of—Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2)—South Wales District Rules.

The purposes for which a joint district board are empowered under the Coal Mines (Minimum Wage) Act, 1912, to make general district rules do not include the provision of a method for ascertaining the actual daily earnings of the workmen. Therefore a rule which provided that "In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks" was held to be ultra vires and void.

The employers, however, are, independently of the rules, and by reason of the settled practice of paying wages at weekly or longer intervals, entitled, when paying the workman's wages, to consider what were his average daily earnings during the "pay" or period in respect of which the wages were payable, whatever the length of the pay may have been; and if such average earnings exceed the minimum wage they are not bound to make any addition to his actual earnings in respect of any day in the pay on which they fell short of the minimum wage.

By s. 1, sub-s. 2, of the Act, "The district rules shall lay down conditions . . . with respect to the regularity and efficiency of the work to be performed by the workmen."

A joint district board made a rule that if a workman from circumstances over which he had no control was unable to perform sufficient work to earn a minimum wage he must at once give notice of that fact to the official in charge of the district, and in default of such notice should forfeit his right to a minimum wage for that pay:—

Held, that the rule was authorized by s. 1, sub-s. 2.

TRIAL of action before Pickford J.

The plaintiffs were colliers employed by the defendants in their colliery at Llwynypia, Glamorgan. The said colliery is within the South Wales (including Monmouth) district created by the Coal Mines (Minimum Wage) Act, 1912. The joint district board constituted under that Act to settle the minimum rates of wages and the general district rules for the district failed to agree, and thereupon Viscount St. Aldwyn, the chairman of the said board, by his award dated July 5, 1912, settled the minimum

rates of wages, and fixed the standard rate of day wage for a collier working at piecework at such a sum as with the addition of a certain percentage to which the workmen were entitled, varying with the price of coal, amounted to 7s. 1½d. He also by the said award made general district rules for the district.

By rule 5 of those rules, "If at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged If any workman shall act in contravention of this rule he shall forfeit the right to wages at the minimum rate for the pay in which such contravention shall take place."

And by rule 7, "In ascertaining whether the minimum wage has been earned by any workman on piecework the total earnings during two consecutive weeks shall be divided by the number of shifts and parts of shifts he has worked during such two weeks."

In the South Wales district the "pay" or period in respect of which the wages on any given pay day were payable had formerly been a fortnight but was now one week.

The action was brought for a declaration that the said two rules were ultra vires and void; that the plaintiffs were entitled to be paid as a minimum wage for each day on which they respectively worked a sum not less than 7s. 1½d., or in the alternative that they were entitled to be paid as a minimum wage at a rate not less than 7s. 1½d. for each day on which they respectively worked during the "pay"; and also for a declaration that the said sums were payable whether any notice such as purported to be required by rule 5 had been given or not.

In addition to hewing and getting the coal which is the remunerative part of the collier's work, he has to discharge various other ancillary duties, such as ripping, which consists of cutting away the roof or soil above the seam for two or three feet in height to allow of headway in the roads, walling the sides, setting up timber, laying rails for the trams, etc. The ripping is in

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the defendants' colliery not paid for separately, the remuneration for it being included in the payment for getting and sending up the coal. The other ancillary duties above mentioned, which are comprehended under what is known as "dead work," are paid for separately. Dead work is not paid for day by day, but is measured up weekly, usually in the middle of the week on Wednesday or Thursday, and is paid for on the Saturday in the following week, when it is added to that week's wages. The evidence called for the defendants went to shew that it would be impossible in practice for the colliery officials to prevent the men from doing all their ripping or dead work in one week and leaving the coal getting to the next.

Sankey, K.C., and R. E. Vaughan Williams, for the plaintiffs. The workmen are entitled to be paid at least the minimum wage on every day that they work, without any regard to what they in fact earn on other days in the same pay; whereas rule 7 provides that for the purpose of ascertaining their actual daily earnings an average is to be taken of their total daily earnings in the preceding fortnight. The difference in the results of the two methods may be illustrated by reference to a concrete case. In the week ending September 7 the men had earned 8s. 9d. each per day. In the week ending September 14 they had earned 5s. 10d. each per day. If the plaintiffs are right they were entitled in respect of the latter week to an addition to their actual earnings of 1s. 3½d. per day in order to bring each day's wage up to the minimum wage of 7s. 1½d., without bringing into account the excess which they earned in the former week above the minimum wage; whereas according to the rule, assuming that the men worked the same number of days in each week, the actual daily earnings would be 7s. 3½d. each, which would be more than the minimum wage, and consequently the men would be entitled to nothing more. But rule 7 is ultra vires. The purposes for which general district rules may be made are defined by s. 1, sub-s. 2(1), and they do not include the

(1) By s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912 "The district rules shall lay down conditions, as respects the district

to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen

provision of a method for arriving at the actual daily earnings and ascertaining whether the minimum wage has in fact been earned or not. If the rules may require the wages to be averaged over a fortnight, why not over a year? And in that event it might be that the Act would never apply if the good times overtopped the bad. Although the earnings are only payable on the weekly or other pay day they accrue due at the end of each day. In *Parkin v. South Hetton Coal Co.* (1) a collier who had been dismissed for misconduct in the middle of a pay was held entitled to recover his wages for the days on which he had worked since the last pay day. If, however, this contention is wrong and the earnings are to be averaged, at all events the average must be taken not fortnightly, but when the pay day arrives, in this district at the end of each week. Secondly, rule 5 is also ultra vires, for it does not go either to regularity or efficiency, and there are no other words in s. 1, sub-s. 2, under which it could be even suggested that it came.

Leslie Scott, K.C., and *Harold Morris*, for the defendants. The plaintiffs' contention that the purposes for which district rules may be made are limited to those specified in s. 1, sub-s. 2, is not correct. The power to make rules is given by s. 2, sub-s. 3: "The joint district board shall settle . . . general district rules for their district." The section does not go on to

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(including workmen partially disabled by illness or accident) and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no

control. The district rules shall also make provision with respect to the persons by whom and the mode in which any question whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section."

(1) (1907) 98 L. T. 162.

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say what the rules are to be for, but it apparently gives the board a free hand to do their best to carry out the purposes of the Act. Sect. 1, sub-s. 2, says that the rules shall deal with certain matters, but it does not say that they shall not deal with any others. But assuming that the purposes are so limited, both these rules 5 and 7 are justified as laying down conditions "with respect to the regularity and efficiency of the work to be performed by the workmen." A man does not work regularly and efficiently if he works hard one day and becomes entitled to a high wage in respect of it, and then works slackly the next knowing that he will get at least the minimum wage for it. The rule as to averaging is the only means of ensuring that the requirement of regularity and efficiency has been complied with. And it is necessary that that average should be taken over a period not less than a fortnight. This is obvious from the case cited for the plaintiffs of men earning 8s. 9d. one week and 5s. 10d. the next. It would be in the power of the workmen so to manipulate their work that they did all the more remunerative work in one week and all the less remunerative dead work in the other. Moreover the evidence shewed that the practice of measuring dead work in the middle of one week and not paying for it till the end of the next had the effect of spreading the dead work account over two or more weeks. Therefore it would be impracticable to arrive at a fair estimate of the total daily wage except by averaging for a period of not less than a fortnight. In the case of ripping it would be still more unfair on the employers if the rule as to the minimum wage was applied day by day. For, the payment for ripping being included in the wage paid for getting the coal, if the men were to be paid a minimum wage for the days on which they did nothing but ripping they would be paid twice over for it. With regard to rule 5 it is obvious that notice to the official of difficulty in the conditions of the work is necessary in order to check the truth of the man's allegation and to ensure that his small output was not due to his inefficiency, for as the seam was worked the evidence as to whether there was or was not any difficulty would rapidly disappear.

Sankey, K.C., in reply.

PICKFORD J. This case raises two points as to the validity of two rules in the award made by Lord St. Aldwyn, the chairman of the joint district board. The first is rule 7, which provides the method of ascertaining whether the minimum wage has in fact been earned, the method being to divide the total earnings of the workman during two consecutive weeks by the number of shifts and parts of shifts that he has worked during those two weeks. It is what has been called an averaging rule. The contention of the plaintiffs is that there was no power to make such a rule, and that the Coal Mines (Minimum Wage) Act must be applied day by day, or, if not day by day, at any rate week by week, the pay in this particular district being at weekly intervals. That depends upon the construction of the Act. No doubt the Act does not provide for all contingencies—a good deal was left to the district boards—probably because it was passed with very great rapidity for the purpose of putting an end to a strike, which, whatever its merits, was a national calamity. The leading provision is in s. 1, sub-s. 1: “It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.” Then sub-s. 2 prescribes the conditions which the district rules shall lay down. [He read the sub-section.] The district board having failed to come to an agreement, Lord St. Aldwyn as the chairman made these rules, and the question is whether rule 7 is within the power given by the statute. The defendants, the colliery owners, say that averaging is absolutely necessary in order to arrive at a just result; for it is impossible to ascertain the actual daily earnings without a process of averaging. Two instances were given

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shewing why that could not be done; one was the case of what is called ripping, the payment for which is included in the wage for the hewing of the coal, and a man might be ripping on one or two days, sending up no coal at all, and then on the next few days hewing and sending up the coal, so that if he were paid a minimum wage for the days on which he did nothing but ripping he would be paid for the ripping twice over. Another instance given was that of what is called dead work, that is to say, work incidental to the getting of the coal other than ripping the roof. That dead work is not paid for day by day; it is measured up on a particular day in the week and the remuneration for it is added to the payment for the coal. It is impossible under those circumstances to get at the dead work wage for a particular day except by taking an average of the week, or in some cases of a longer period, owing to the fact that the dead work is measured in the middle of one week, and the man is not paid for it until the end of the following week, and consequently the payment for some of the dead work so measured is carried forward into another week's account. The defendants say that the making of a rule for taking such an average was within the jurisdiction of the district board, and as the determination of the daily earnings is a matter on which there might be considerable difference of opinion it is one which it may be extremely advisable that the board should have power to settle. But I cannot find anything in the Act which empowers the district board to settle the method of ascertaining the actual earnings for the purpose of seeing whether some addition is required to bring them up to the minimum standard. It is contended that such a power is to be found in the provision that "the district rules shall lay down conditions . . . with respect to the regularity and efficiency of the work to be performed by the workmen." Incidentally no doubt it may have the effect of making the work more regular. It is said that it would prevent the men from doing all the ripping together on certain days and getting the benefit of the minimum wage on those days, and then hewing all the coal on one or two days when they do no ripping, instead of doing a certain amount of ripping and hewing on each day in the way that produces the most efficient result. That may be so, but I

think it would be a stretching of language to say that it was a rule for laying down conditions with respect to the regularity and efficiency of the work. One of the conditions which the Act provides that the rules shall lay down is as to the forfeiture by the workman of his right to wages at the minimum rate if he does not comply with the conditions as to regularity and efficiency of work; and that rather points to some regulations which it is in the power of the workman to comply with or not as he pleases, and not to a regulation which merely indirectly leads to efficiency. Therefore I come to the conclusion, though with some regret, that rule 7 was not within the powers of the district board. Then what follows from that? Mr. Sankey says that the earnings must be considered day by day, and if on any particular day they fall short of the minimum they must be made up to the minimum for that day. I do not think that that follows. The Act must be read by the light of the circumstances which were known to all parties at the time it was passed. Every one knew that there was no such thing as a wage paid daily, but that the wages were paid at longer intervals. In the district with which we are dealing it is a week, and on the weekly pay you can roughly ascertain what the daily rate of the man's earnings has been; not, indeed, with absolute accuracy, because there may be some dead work to be brought in from the previous week or to be carried forward to the following week, but roughly and sufficiently for this purpose. The other rule the validity of which has been questioned in this action is rule 5. It provides that "If at any time any workman shall in consequence of circumstances over which he alleges he has no control be unable to perform such an amount of work as would entitle him under the price list or other agreed rates to a sum equal to the daily minimum rate, then and in such case he shall forthwith give notice thereof to the official in charge of the district in which he shall be engaged" on pain, in the event of his failing to do so, of losing his right to be paid at the minimum rate for that pay. The question is whether that is laying down a condition with respect to the regularity and efficiency of the work. On the whole I think it is, though it is undoubtedly very near the line. It contributes to regularity and efficiency that a man should not

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be able to shirk his work and subsequently, at a time when the correctness of his statement cannot be tested, say that the reason why he did so little was that he was prevented by the conditions from doing more. I think that rule 5 falls within the powers conferred by the Act.

Judgment accordingly.

Solicitors for plaintiffs: *Smith, Rundell & Dods, for Morgan, Bruce & Co., Pontypridd.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. F. C.

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[IN THE COURT OF APPEAL.]

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 May 22, 23.

CONSOLIDATED LONDON PROPERTIES, LIMITED v.
 ASSESSMENT COMMITTEE OF THE METROPOLITAN
 BOROUGH OF ST. MARYLEBONE.

London — Poor Rate—Valuation—Flats—Houses and Buildings let out in Separate Tenements—Rateable Value—Deductions from Gross Value—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), Sched. III.

By s. 52 of the Valuation (Metropolis) Act, 1869, it is enacted that in calculating the rateable value of hereditaments for the purposes of the Act the percentage or rate of deductions to be made from the gross value shall not exceed the amounts in the Third Schedule to the Act.

The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list are to be divided and the maximum rate of deductions to be made in respect thereof, contains in a footnote a provision that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements.

A certain company were the owners of buildings consisting of two blocks divided into flats. Each flat was self-contained and had its own front door opening on to a common staircase. The staircases were lighted and cleaned and lifts for the use of tenants were worked by servants employed by the company. Each flat was in the separate occupation of a tenant holding under a lease or agreement and having a separate rateable occupation of his flat. Each tenant was entered in the valuation list as the rateable occupier and was rated in respect of his occupation. The company were not entered in the valuation list as

occupiers, and were not rated as occupiers, either of the blocks or of the flats. The blocks were not nor was either of them separately valued in the valuation list. The flats were entered in the valuation list and valued as separate rateable hereditaments.

In calculating the rateable value of the flats the assessment committee made deductions from the gross value as directed by the Third Schedule to the Act. The company contended that the blocks were houses or buildings let out in separate tenements within the meaning of the footnote to the schedule, and that the deductions specified in the schedule did not apply:—

Held, that the case was covered by *Western v. Kensington Assessment Committee* [1908] 1 K. B. 811, that the blocks were houses or buildings let out in separate tenements within the meaning of the footnote to the schedule, and that the contention of the company was correct.

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APPEAL from a Divisional Court (Lord Alverstone C.J., Channell and Avory JJ.) upon a case stated by the Court of Quarter Sessions for the county of London.

By s. 52 of the Valuation (Metropolis) Act, 1869, it is provided that the percentage or rate of deductions to be made from the gross value in calculating the rateable value of hereditaments for the purposes of the Act shall not exceed the amounts in the Third Schedule to the Act (1), so far as the same are applicable.

The Third Schedule to the Act (1), after specifying the maximum rate of deductions in case of various classes into which the hereditaments inserted in a valuation list under the Act are to be divided, contains in a footnote a provision to the effect that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and to the general principles of law.

The special case was as follows:—

“This was an appeal by the Consolidated London Properties, Limited (hereinafter called the appellants), to the quarter sessions for the county of London against the several rateable values as determined by the Assessment Committee of the Metropolitan Borough of St. Marylebone (hereinafter called the respondents) of certain hereditaments comprised in the

(1) See note on p. 245, post.

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valuation list made on or about May 31, 1910, for the metropolitan borough of St. Marylebone under and for the purposes of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67). In this case the appellants to the Court of Quarter Sessions are mentioned as the appellants and the respondents in the said Court are mentioned as the respondents.

SPECIAL CASE.

2. "The appellants are the owners of buildings consisting of two blocks which are (as herein appears) divided into flats known as Hyde Park Mansions situate in the borough of St. Marylebone in the county of London. A plan of the said buildings is hereto annexed marked A.

3. "A certain number of flats are situate on each side of a common staircase which with lifts forms the approach to the several flats situated thereon. There are fifteen such common staircases in the buildings. There are eight passenger lifts, twenty-five service lifts, and twenty-five basket lifts in the buildings. There is no internal communication between any two of such staircases, but all the staircases in each block open on a courtyard common to the block. Each flat is self-contained and has its own front door opening on to the common staircase, and the persons residing in the flats have the common use of the staircase and lifts. There are porters (employed by the appellants) whose duties are in relation to the buildings. The said staircases are lighted and cleaned and the said lifts are worked by servants employed by the appellants.

4. "In the schedule hereto is a copy of the return (marked B) made pursuant to the Valuation (Metropolis) Act, 1869, on behalf of the appellants which shews the number of the flats, their tenants, the rental of each flat, the occupier of each flat, the term of years for which each flat is let to the occupier. Each flat is in the separate occupation of the tenant, and it is an admitted fact that each tenant is an occupier having a separate and distinct rateable occupation of his flat. It is also the fact that each tenant is entered in the valuation list as the rateable occupier, and in every rate which has been made since the list took effect on April 6, 1911, the tenant has been rated to the rate in respect of

his occupation of his flat and not the owners. The appellants are not entered as occupiers of the building or the flats therein in the valuation list nor in any rate made as aforesaid. The same state of things prevailed in regard to the valuation list previously in force and in regard to rates made before April 6, 1911.

5. "The said flats are let on agreements or leases for various terms of years, and by many of the said agreements and leases the tenant agrees to do all internal repairs. The external repairs are in all cases done by the appellants. Specimen agreements and leases are annexed hereto marked C, D, E, F, and in the form G.

6. "In May, 1910, the valuation committee for the said borough of St. Marylebone duly made and signed a valuation list for the said borough. In such valuation list the several flats contained in the said buildings were inserted as 147 separate rateable hereditaments and numbered 2695 to 2841 inclusive and each tenant was inserted as the rateable occupier of his flat.

7. "The appellants duly made objections to the said valuation list asking that the gross and rateable values of the said several hereditaments might be altered and they duly appeared in support of such objections before the respondents—the assessment committee for the said borough. Such objections and appearances were made by virtue of ss. 2 and 3 of the Valuation (Metropolis) Amendment Act, 1884 (47 & 48 Vict. c. 5), inasmuch as the appellants by arrangement with the rateable occupiers of the said hereditaments pay the rates due in respect of each of the said several hereditaments.

8. "The respondents after hearing the appellants' objections altered the several gross and rateable values of some of the said hereditaments. In the valuation list as so altered the deductions made from the gross values of the said several hereditaments in calculating the rateable values thereof were approximately at the rate of one fifth or twenty per cent., being the maximum rate of deductions shewn in the Third Schedule to the Valuation (Metropolis) Act, 1869, against class 4.

9. "The appellants gave notice of appeal, a copy of which marked H is annexed to and shall be deemed to form part of this

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C. A. case, but did not appeal against the said decisions of the respon-
 1913 dents so far as regards the gross values of the said several
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 DATED far as regards the respective rateable values of the said several
 LONDON hereditaments. At the hearing of the appeal the appellants
 PROPERTIES, alleged that the probable annual average cost of the repairs and
 LIMITED v. insurance and other expenses necessary to maintain the said
 ST. MARYLE- several hereditaments in a state to command the rents repre-
 BONE sented by the said gross values exceeded the amount of deduction
 ASSESSMENT made from the said gross values in calculating the said rateable
 COMMITTEE. values.

10. "The appellants contended

"(1.) That the deductions from the several gross values to arrive at the several rateable values were not limited in law to the maximum deductions set out in the second column of the Third Schedule to the Valuation (Metropolis) Act, 1869, and allowed by the respondents, but should be determined in each case according to the circumstances and the general principles of law even though the said maxima were exceeded;

"(2.) That the footnote to the said schedule applied to the ascertaining of the rateable values of the said several hereditaments; and

"(3.) That the said buildings were houses or buildings let out in separate tenements within the meaning of the footnote to the said Third Schedule of the Valuation (Metropolis) Act, 1869.

11. "The information in columns 1 to 8 in the schedule to the said notice of appeal is derived from the valuation list and corresponds therewith. Neither in the valuation list nor in the rates is there any separate value inserted in respect of the sets of flats as a whole or the building as a whole. The only values inserted are of each flat as a separate and distinct subject of occupation.

12. "At the hearing before the said Court of Quarter Sessions evidence was put in and admissions of facts were made sufficient for the questions of law raised by this case, and it was agreed between the parties that, should it become necessary thereafter, any question of the amount of deductions to be made if the appellants' claim was well founded in law should be referred for

determination in a manner agreed before the said Court and then sanctioned by the said Court.

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13. "On behalf of the respondents it was contended that the deductions from the gross values to arrive at the rateable values of the said several hereditaments could not lawfully exceed the appropriate maximum to be found in the Third Schedule to the Valuation (Metropolis) Act, 1869, and that the footnote to the said schedule did not apply to the assessment or valuation of the said respective separately occupied flats.

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14. "The Quarter Sessions were of opinion that (whatever might be their own view) they were bound by the decision of the Divisional Court of the King's Bench Division of the High Court of Justice in the case of *Western v. Kensington Assessment Committee* [1907] 2 K. B. 323, which judgment was afterwards affirmed by the Court of Appeal (1) on grounds other than those on which the Divisional Court acted, and consequently they decided against the contention of the respondents, but agreed with the concurrence of both parties to state a case for the opinion of the High Court of Justice.

QUESTION.

15. "The question upon which the opinion of the Court is desired is:—

"Whether the said footnote to the Third Schedule of the Valuation (Metropolis) Act, 1869, applies to the ascertaining of the several rateable values of the said several hereditaments.

"This case raises an appeal within the terms of the Judicature Act, 1894, s. 2."

The Divisional Court, following *Western v. Kensington Assessment Committee* (1), held that the blocks of buildings were houses or buildings let out in separate tenements within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869; and that in arriving at the rateable values of the flats deductions from the gross values might be allowed at a rate greater than the maximum rate of deductions specified in the Third Schedule.

The assessment committee appealed.

(1) [1908] 1 K. B. 811.

C. A. *Danckwerts, K.C., and Courthope Munroe*, for the assessment
 1913 committee. The blocks of buildings in this case are not houses
 or buildings let out in separate tenements within the meaning of
 the footnote of the Third Schedule to the Valuation (Metropolis)
 Act, 1869. To hold that they are so is to mistake the scheme of
 the Act. The Third Schedule has nothing to do with buildings or
 blocks which are not rateable hereditaments. By s. 6 of the Act
 the overseers of every parish are to make and sign a valuation
 list of their parish. By s. 51 the valuation list is to be in the
 form given in the Second Schedule to the Act. It is plain
 that the form in that schedule is only applicable to rateable
 hereditaments. By the same section the overseers are to include
 every hereditament in their parish and are to enter every
 hereditament in the valuation list in accordance with the classes
 mentioned in the Third Schedule. By s. 4, the interpretation
 section, hereditament means any lands, tenements, heredita-
 ments, and property which are liable to any rate or tax
 in respect of which the valuation list is by the Act
 made conclusive. It follows that the Third Schedule contains
 rateable hereditaments and no others. Then by s. 52 of the Act
 the percentage or rate of deductions to be made from the gross
 value in calculating the rateable value shall not exceed the
 amounts in the Third Schedule so far as the same are applicable.
 In a case like the present the rateable hereditaments to be
 inserted in the valuation list are the flats and not the blocks:
Reg. v. St. George's Union (1); *Allchurch v. Assessment Committee*
and Guardians of Hendon Union. (2) In these circumstances
 when the footnote says that the maximum rate of deductions
 prescribed in the schedule shall not apply to houses or buildings
 let out in separate tenements it cannot refer to a block or
 aggregation of rateable hereditaments, because such a block never
 finds a place either in the valuation list or, consequently, in the
 schedule.

The Court of Quarter Sessions and the Divisional Court
 held themselves bound by the decisions of the Divisional
 Court and of this Court in *Western v. Kensington Assessment*

(1) (1871) L. R. 7 Q. B. 90.

(2) [1891] 2 Q. B. 436.

Committee. (1) The facts in that case resemble those in the present in that two blocks consisting of shops and flats came in question. But there was this material distinction, that in that case it did not appear whether the blocks were or were not separately rateable hereditaments and inserted in the valuation list. The judgments of the Earl of Halsbury and Bigham J. seem to be based on the assumption that the blocks were separately rateable and were inserted in the valuation list, while Vaughan Williams L.J. said that the facts as stated did not enable the Court to decide whether the footnote did or did not apply. That case is no authority in the present case. Here the blocks are not, and the flats are, included in the valuation list. It follows that unless the flat is let out in separate tenements the footnote has no application.

Ryde, K.C., and *Konstam*, for the Consolidated London Properties. The decision in *Western v. Kensington Assessment Committee* (2) covers this case; in other words the Court of Appeal in that case decided that a block not itself separately rated, consisting of an aggregation of flats each of which is separately rated, is a house or building let out in separate tenements within the meaning of the footnote to the Third Schedule to the Act of 1869. In that case it was stated that each block originally consisted of two private houses which had been converted into two shops and three flats; that the two shops and three flats were five separate rateable hereditaments; and that in the valuation list the two blocks were mentioned as ten rateable hereditaments. The notice of objection complained of the rateable values of those ten hereditaments. To say that each of the blocks in that case was supposed by the Court to be a separate rateable hereditament is to suggest that the Court mistook the facts stated, the effect of the notice of objection, the judgments of the Court below, and indeed the whole case, because each block was beyond all question let out in separate tenements; if it was also a separately rateable hereditament there would have been nothing for *Western* to argue. When the footnote speaks of houses and buildings let out in separate tenements it uses the word tenements in its ordinary sense, which includes tenements

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(1) [1907] 2 K. B. 323; [1908] 1 K. B. 811. (2) [1908] 1 K. B. 811.

C. A. which are rateable if indeed it does not exclude tenements which
1913 are not rateable, such as lodgings.

CONSOLI- [They further argued that irrespective of *Western v. Kensington*
DATED *Assessment Committee* (1) the Court of Quarter Sessions and the
LONDON Divisional Court in the present case had correctly construed the
PROPERTIES, footnote to the Third Schedule. This argument was substan-
LIMITED tially that urged in favour of *Western* in *Western v. Kensington*
v. *Assessment Committee*. (2) Having regard to the view taken by
ST. MARYLE- this Court, it is unnecessary to report this part of the argument.]
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Danckwerts, K.C., replied.

VAUGHAN WILLIAMS L.J. We are bound by the decision in *Western v. Kensington Assessment Committee*. (1) I will read first the commencement of Lord Halsbury's judgment; it is as follows: "In my opinion this appeal should be dismissed. I desire to preface the few remarks which I have to make by saying that I decline to consider myself bound to answer questions which are inappropriate to the circumstances of the case, so far as we know them. I have no objection to answer questions which are appropriate to the real question of law underlying the dispute between the parties, and I think that the first question should be answered in the affirmative; in other words, I am of opinion that blocks or buildings such as those in the present case are houses or buildings let out in separate tenements within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869." In strictness I ought to have read that footnote. The schedule is headed "Third Schedule shewing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided." Then there are classes 1 to 11. Then comes this footnote: "The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11." The words of Lord Halsbury which I have read are a clear decision as to the meaning of that footnote, and that decision binds us. Lord Halsbury then went on to deal with some other questions; he said: "The other questions, which seem to be appropriate

(1) [1908] 1 K. B. 811. (2) [1907] 2 K. B. 323; [1908] 1 K. B. 811.

only to a different condition of things, it is difficult to answer in terms." Then his Lordship continued: "The second question is 'whether the effect of the footnote is to take whatever property is therein referred to out of the class in which it would otherwise be, and to put it into one or other of the classes 9, 10, and 11.' That question is not appropriately expressed; but all that the footnote says is that the houses or buildings to which it applies are to be rated as though they were in classes 9, 10, or 11; and that question is one the answer to which is dependent on the particular facts of each case. I protest against its being supposed that I am giving an opinion as to the propriety of taking, in a block of buildings capable of being rated, each room in the block and then applying the footnote to it; in my opinion the footnote does not apply to such a case. As a matter of history, the mode in which this enactment came to pass is quite intelligible. At the time when the statute was enacted the system of building big houses divided into separate flats was growing, and those who devised the scales of maximum deductions were struck by the plain fact that the circumstances might vary to such an extent that the general description applicable to the buildings in the schedule might be inappropriate to such buildings as we are considering. To get rid of the difficulty the Legislature said that the maximum deductions were not to apply in such cases, because, the circumstances being peculiar, they might require special treatment; they were therefore left to the ordinary operation of the law, and the statutory maxima were made inapplicable to them. So far the matter is clear enough. But could any one suppose that it was intended to rate separately the different rooms in these large buildings, and then to apply the footnote to them? I think not. In my view the idea of the Legislature was that the building as a whole should be rated, and that the occupier of the whole was the owner, whether his ownership was freehold or leasehold, or of whatever nature it might be. The mode in which the assessable value was to be ascertained was by taking the thing in its condition at the time and making the proper deductions applicable to the whole house; in such cases the maximum deductions under the statute might prove to be inapplicable."

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I have read that passage so that those who would construe my judgment may have the judgment of Lord Halsbury before them and so see how I came to make the exception, if I may call it so, that I made when I delivered my judgment. I entirely agreed with Lord Halsbury's conclusions in answering the first question, and it seemed to me that, when that first question had been answered, there was nothing further to answer. As I said, "I wish to say nothing which would involve travelling beyond the actual questions submitted to us by quarter sessions in the special case. As to the question of the application of the footnote, it depends, in my opinion, upon the occupation of the house." I agree with Mr. Danckwerts that the actual description of the tenant was not given, but I do not think that was what was present to my mind. I said "There is not sufficient information in the case to enable us to say what the occupation really was." So far as I am concerned, I thought that, Lord Halsbury having decided the point of construction which was involved in the first question, nothing else was necessary to be decided, and I think Lord Halsbury by his words intimates the same idea. He did go on to use certain expressions raising questions which we had not got to answer. All I said was that, as far as I was concerned, I did not propose to do anything more than assent to the first paragraph of Lord Halsbury's judgment which was based on the answer to the first question and which concluded with the words, "I am of opinion that blocks of buildings such as those in the present case are houses or buildings let out in separate tenements within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869." As to the other matters I had not got to consider them and I did not wish to affirm or deny them.

I think this appeal should be dismissed.

BUCKLEY L.J. The question for decision arises on s. 52 of the Valuation (Metropolis) Act, 1869, and the Third Schedule to that Act, and in particular on the footnote to the Third Schedule. Concisely stated the point for decision is whether that footnote means that the maximum rate of deductions shall not apply in the case of houses or buildings let out in separate

tenements; or whether it means that the maximum rate of deduction shall not apply to a rateable hereditament being a house or building let out in separate tenements.

We have here to do with a large block of buildings which block is not a separate rateable hereditament, because it is not in the occupation of one occupier. That block is subdivided into many separate rateable hereditaments in the occupation of different occupiers. The block therefore is let out in separate tenements. The flat which is the thing to be rated is not let out in separate tenements. In the circumstances is the maximum rate of deductions to apply to the flat? The footnote says "the maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements." Mr. Danckwerts' argument rests on that word "to"; he insists that the footnote does not mean that the maximum rate shall not apply in the case of houses or buildings let out in separate tenements, but that it means that it shall not apply to a rateable hereditament being a house or building let out in separate tenements.

If the point were free from authority I should be of opinion that there is much to be said for this view. Sect. 52 of the Act of 1869 is an enactment relating to the rate of deduction to be made from the gross value in calculating the rateable value; so that the subject-matter is a rateable hereditament and not an aggregation of rateable hereditaments. The Third Schedule commences with the words "shewing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided." Incontestably there would be inserted in the valuation list only each rateable hereditament, and not the larger block of which the rateable hereditament forms part. Inasmuch as the footnote is being applied for the purpose of working out s. 52 and calculating the rateable value as prescribed therein, there is great force in the contention that it means that the maximum shall not apply to the rateable hereditament when it is such as is there described. That is the argument on the one side. On the other side the words are quite capable of this meaning: The maximum rate of deduction shall not apply in the case or to the case in which

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 1913 considered. If I had to choose between those two constructions
 CONSOLI- not guided by authority, I do not say what conclusion I should
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 LONDON already arrived at a conclusion as to the true meaning of those
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In *Western v. Kensington Assessment Committee* (1) exactly this question arose in the sense that there were two blocks divided into separate horizontal strata; those separate strata were separate tenements; the question was whether the maximum applied. This Court held that the maximum did not apply. The assessment committee had decided the other way; the Divisional Court reversed the decision of the assessment committee; the Court of Appeal affirmed the decision of the Divisional Court. The result was a decision that in the circumstances of the case the maximum did not apply, and that the ratepayer was entitled to a larger measure of deduction. I have to see if that decision binds me in the present case. What I am bound by is the principle of the decision as found in the utterances of the judges. I have had some difficulty in finding out what the Court did decide and what were the grounds of decision. I will state the grounds on which, when fairly read, the decision seems to me to rest.

Lord Halsbury was treating the matter on this footing: He was pointing out that a system had sprung into existence of building big houses divided into separate flats, and that this practice was increasing; that those who devised the scales of maximum deductions were struck by the fact that the general description of the buildings in the schedule to the Act of 1869 might be inappropriate to buildings of this description; and that to get rid of this difficulty the Legislature said "that the maximum deductions were not to apply in such cases." "In such cases" there must mean in cases in which the system of building a big house divided into separate flats had taken effect in action. The reasoning of Lord Halsbury's judgment is that the scope, object, intention, and effect of the legislation was that the assessment officer, going on his rounds and finding a great block of buildings

(1) [1908] 1 K. B. 811.

divided into separate flats, should know that he is not to apply the maximum in such a case. I turn now to the judgment of Bigham J. That learned judge read the footnote and then said "No one could say that the blocks of buildings in this case do not come within that description." The blocks of buildings were the large buildings divided into separate rateable hereditaments; therefore Bigham J. was saying that large blocks divided into and let out in separate tenements come within the words of the footnote. Then he asks, "If they do, are the overseers right in applying the maximum rate of deductions?" In other words, can the overseers say that the ratepayer may not have an allowance beyond the sum indicated in the schedule as the maximum rate of deductions? He answers, "In my judgment they are applying it without having regard to the circumstances of each case": that is to say, in applying the maximum rate and in refusing the ratepayer a larger rate the overseers are applying the maximum rate of deduction and are not having regard to the fact that the tenement is a flat in a large block of buildings. His next words are these: "They are arriving at the maximum deduction in respect of the whole building." Pausing there a moment, that must mean the maximum deduction in respect of the several rateable hereditaments, the aggregate of the flats, making the whole building. The building as a whole was not being rated, so there could not be a deduction in respect of it. Therefore I take the learned judge as meaning that the overseers are arriving at the maximum deduction in respect of the aggregate of the flats in the whole building "by having regard to the maximum deduction in respect of each flat." "In so doing" he says "they are, in my judgment, violating the spirit of the statute." What he was intending to express was that where the block is divided into a number of separate flats, although the block as a whole is not being rated, it is nevertheless wrong to say that the maximum rate of deduction is applicable by reason of the fact that the flat itself is not let out in separate tenements. I cannot understand his words in any other sense.

Furthermore, Vaughan Williams L.J. and Bigham J. both say that they have not materials for answering the question whether the building ought to be rated as one single building or whether

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each flat ought to be rated as a separate rateable hereditament: yet they decide something. Their decision must therefore be one which holds good whichever way that question be answered, i.e., whether the building ought to be rated as a whole or whether each flat ought to be rated separately. If the building was properly rateable as a whole there would be an end of the question, because beyond all doubt it was let out in separate tenements. Then when the Court said that it mattered not whether the building was properly to be rated as a whole or whether each flat ought to be rated separately, it in substance decided that the maximum rate of deduction does not apply where each flat is rateable as a separate rateable hereditament. For these reasons I am of opinion that this Court in *Western v. Kensington Assessment Committee* (1) accepted the construction which leaves the footnote as if it ran thus: "The maximum rate of deductions prescribed in this schedule shall not apply in the case where a house is let out in separate tenements whether the thing to be rated is the house as a whole or the separate tenement in the house." That being so, the question for decision has been decided already, and we are bound by the decision in *Western v. Kensington Assessment Committee*. (1) This appeal must therefore be dismissed.

HAMILTON L.J. I am of the same opinion. Whatever may be said of *Western v. Kensington Assessment Committee* (1) it is quite clear that the Court unanimously answered in the affirmative the question put in that case, namely, "Whether blocks or buildings let out in separate flats, such as the appellant's property, are 'houses or buildings let out in separate tenements' within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869." The blocks or buildings let out in separate flats, such as the appellant's property in that case, were, as regards the essentials of their description, the same as the blocks or buildings let out in separate flats such as the company's property in the present case. The question was answered in the affirmative, although two members of the Court said they did not know, and apparently did not think it necessary

(1) [1908] 1 K. B. 811.

to inquire, whether the occupation really was an occupation by one landlord of the whole building or by many tenants of many parts of the buildings. It follows that the question should be answered affirmatively in the present case where we do know what the occupation really is, namely, an occupation by many tenants separately of many flats. The argument for the assessment committee involves the contention that each one of the distinguished members of that Court in his turn contrived to misunderstand the facts of the case, the arguments of counsel, the authorities cited, the principle of the judgment of each of his colleagues, and the language of his own. That contention I cannot accept. For reasons which were doubtless good each member of the Court thought it right to express his opinion upon the first question shortly, and to refer to the subsequent questions with some reservations. As to these I see no real doubt in the language of the members of the Court, and certainly am entirely unable to accept the construction which the appellants seek to put or force upon the language of Vaughan Williams L.J. As that decision is authority in the present case, it is quite unnecessary to discuss whether it was right or wrong, but I do not wish to be understood as suggesting or believing that it was not right.

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Appeal dismissed.

Solicitors for the assessment committee : *Sharpe, Pritchard & Co.*

Solicitors for the Consolidated London Properties: *Charles Stevens & Drayton.*

NOTE.—THIRD SCHEDULE

Shewing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided :—

		Maximum rate of deductions.
		Per cent. or proportion.
Class 1.	Houses and buildings, or either of them, without land other than gardens where the gross value is under 20%	25 or $\frac{1}{4}$ th.
„ 2.	Houses and buildings without land other than gardens and pleasure grounds	

C. A. 1913		Maximum rate of deductions.
CONSOLI- DATED LONDON PROPERTIES, LIMITED v. ST. MARYLE- BONE ASSESSMENT COMMITTEE.	Class 3.	valued therewith for the purpose of inhabited house duty where the gross value is 20%. and under 40%. . . .
		Per cent. or proportion.
		20 or $\frac{1}{5}$ th.
	,, 4.	Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 40% or upwards
	,, 4.	16 $\frac{2}{3}$ or $\frac{1}{3}$ th.
	,, 4.	Buildings without land which are not liable to inhabited house duty and are of a gross value of 20% and under 40% . .
	,, 5.	20 or $\frac{1}{5}$ th.
	,, 5.	Buildings without land which are not liable to inhabited house duty and are of a gross value of 40% or upwards . .
	,, 6.	16 $\frac{2}{3}$ or $\frac{1}{3}$ th.
	,, 7.	10 or $\frac{1}{10}$ th.
	,, 7.	5 or $\frac{1}{20}$ th.
	,, 8.	33 $\frac{1}{3}$ or $\frac{1}{3}$ rd.
	,, 9.	Tithes, tithe commutation rent charge, and other payments in lieu of tithe . .
	,, 10.	Railways, canals, docks, tolls, water-works, and gasworks
	,, 11.	Rateable hereditaments not included in any of the foregoing classes
		To be determined in each case according to the circumstances and the general principles of law.

The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in Classes 9, 10, and 11.

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]	K. B. D.
THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY, APPELLANTS <i>v.</i> THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF LIVERPOOL, RESPONDENTS.	1912 <i>May</i> 1, 2, 9. C. A. 1913
<i>Local Government—Rating—Land used as a Railway—Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), s. 36.</i>	<i>Jan.</i> 14, 15, 16; <i>May</i> 9.

By the Liverpool Corporation Act, 1893, which authorized the corporation to make annually a general rate, to be levied on the net annual value of all property for the time being assessed to the relief of the poor, it was provided that "no person occupying land used only . . . as a railway made under the powers of any Act of Parliament for public conveyance" should be rated in respect of the same to the general rate in any greater proportion than one fourth part of the net annual value thereof.

The appellants were the owners of two goods stations in Liverpool, both of which were situated at a level of about 26 feet lower than their main lines of railway; they were connected with the main line by an inclined line of rails down which wagons ran, and also by wagon hoists, up which wagons were always taken to the higher level:—

Held by Vaughan Williams and Kennedy L.JJ., that the sidings and turntables and the land thereunder, and the hoist houses and land thereunder, hoists, capstans and their machinery, were rateable as land used only as a railway under this provision, but that the following items were not so rateable:—the roof over lines directly productive, the roof over loading platforms and mounds, the roof over loading ways or roads, the loading ways or roads and the land thereunder, the loading platforms or mounds and the land thereunder, cattle loading platforms or mounds and the land thereunder, and approach roads to loading ways or roads and the land thereunder.

Per Joyce J.: All the items, except the approach roads, were rateable as land used only as a railway.

CASE stated by the Recorder of Liverpool.

The respondents (hereinafter called the corporation) were the authority for levying the general rate under the Liverpool Corporation Act, 1893 (56 & 57 Vict. c. clxxxi.), s. 34. The appellants (hereinafter called the company) were the owners and occupiers of certain lands together with the buildings, sheds, offices, stables, sidings, turntables, rails and sleepers, and other fixtures and erections in Great Howard Street and Blackstone

C. A. Street, Liverpool, comprising and hereinafter called the North
 1913 Docks Goods Station, and of certain land together with the
 buildings, sheds, offices, stables, sidings, turntables, rails and
 sleepers, and other fixtures and erections thereon comprising
 and hereinafter called the Great Howard Street Goods Station.

LANCASHIRE
 AND
 YORKSHIRE
 RAILWAY
 CO.
 LIVERPOOL
 CORPORATION.

In a general rate made by the corporation under the provisions of the above Act for the year 1909 the railway company were rated as the occupiers of the above-mentioned stations at their full net annual value. The company appealed to the quarter sessions for the city of Liverpool against the said rate so far as it related to the said stations upon the ground that the company were rated in respect of all the lands and hereditaments comprised in each of the said stations (except certain rails) at the full net annual value thereof, whereas the following parts should have been rated at one fourth of the net annual value thereof (1):—

1. Roofs over lines directly productive.
2. Roofs over loading platforms or mounds.
3. Roofs over loading ways or roads.
4. Loading ways or roads and land thereunder.
5. Loading platforms or mounds and land thereunder.
6. Cattle loading platforms or mounds and the land thereunder.
7. Sidings and turntables and the land thereunder.
8. Hoist houses and the land thereunder, hoists, capstans and their machinery.

(1) Liverpool Corporation Act, 1893, s. 36: "The general rate shall be levied on the net annual value of all property for the time being assessed to the relief of the poor and included in the valuation lists of the different parishes of the city in force at the time of levying the rate, with such additions as may be lawfully made under this Act. Provided that—

"(ii.) No person occupying land used as arable, meadow, or pasture ground, or orchards

or allotments only, or as woodland, market garden, or nursery ground, or any land covered with water and used only as a dock or a canal or the towing path thereof, or as a railway made under the powers of any Act of Parliament for public conveyance, shall be rated in respect of the same to the general rate in any greater proportion than one fourth part of the net annual value thereof."

9. Approach roads to loading ways or roads and the land thereunder.

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No question arose upon the appeal as to the company's directly productive running lines in the said stations.

Upon the hearing of the appeal the following facts were found by the recorder :—

NORTH DOCKS GOODS STATION.

Paragraph 13 of the case was as follows :—It was agreed between the parties that the land, buildings, and other erections and fixtures comprising the said station as included in the poor rate valuation list were to be treated for the purposes of the appeal as divided into the different parts hereunder mentioned and that the total rateable value should be distributed among the said parts in the amounts hereunder mentioned :

Schedule A.

1. The roof over lines directly productive	£357
2. The roof over loading platforms and mounds	190
3. The roof over loading ways or roads	320
4. The loading ways or roads and the land thereunder	654
5. The loading platforms or mounds and the land thereunder	399
6. Cattle loading platforms or mounds and the land thereunder	162
7. Sidings and turntables and the land thereunder	789
8. Hoist houses and land thereunder, hoists, capstans and their machinery and cranes	51
9. Approach roads to loading ways or roads and the land thereunder	437
10. Buildings and land thereunder and premises other than the above	4285
Total rateable value	<u>£7644</u>

The company claimed that they were entitled to be rated at one fourth only of the rateable value of items numbered 1 to 9 inclusive in the above schedule.

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C. A. The following was a description of the North Docks Goods
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(a) The North Docks Goods Station was situated between Regent Road and Great Howard Street, in the parish of Liverpool, and was connected with the company's lines of railway. The goods station was upon the ground level, and the company's railway was generally throughout the city and at the point where it crossed Blackstone Street a high level railway at a height of 22 feet 6 inches above the ground level, and supported on piers and arches. The lines of rails descended on to the station by means of an incline.

(b) The station was fenced off from Great Howard Street by a substantial wall with openings therein, which were used for the purpose of admitting carts and lorries. These openings could be closed when necessary by sliding gates. The goods station covered an area of about sixteen acres, and contained lines of rails, sidings, sheds, cattle pens, and the other things mentioned in schedule A to paragraph 13. The station was intersected by Blackstone Street, across which were railway lines to connect the two portions.

(c) The central portion of the goods station was occupied by lines of rails, sidings, and turntables with mechanical capstans for moving wagons into positions where they were required. Such capstans were used for this purpose as well as locomotives. The station was also connected at two points with the dock line of railway, which ran parallel with the whole system of docks. It had also a connection on the south side with the dock board's tobacco warehouse by a double line across Walter Street. Adjoining Great Howard Street was a large shed, 470 feet long by 220 feet wide, with slate and glass roof carried on iron columns and covering an area of nearly $2\frac{1}{2}$ acres.

(d) The shed was divided into five spaces or bays with four raised cartways or platforms, which were approached by roadways for carts which were on the ground level. Between each bay and at the ground level were lines of rails connected with the system of lines in the middle of the yard. Another shed, 260 feet long by 130 feet wide, covering about three-quarters of an acre, adjoining Blackstone Street, was more particularly used

as a goods station for bales of cotton received from the docks. This shed was similarly provided with loading platforms and loading ways.

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(e) Adjoining Fulton Street and forming part of the north-westerly side of the goods station was a four-storey brick goods warehouse, 245 feet long and 90 feet wide. This warehouse was used for general storage. It was connected with the central system of lines of rails by means of a branch line of rails. The warehouse formed part of No. 10 in schedule A above, and no claim was made for exemption in respect thereof.

(f) The raised platforms or mounds which were provided in the sheds alongside the sidings were used for the loading and unloading of goods into and from trucks.

(g) They were also used for the deposit of goods before such goods were despatched, or after such goods had been received and before delivery had been taken thereof. They were about three feet high, with paved surfaces and brick sides or retaining walls.

(h) On the west side of the yard there were certain cattle pens, extending for a length of 500 feet, adjoining the lines of rails. No claim for exemption was made in respect of the back pens where the cattle were placed on their arrival from the docks and sorted. The front pens together constituted a loading platform for cattle, which was divided into several separate pens in order to prevent the cattle from getting mixed after they were sorted and to enable them to be conveniently loaded into the trucks. The cattle passed from the back pens through the front pens into the trucks.

(i) There was also in the station a range of coal shoots or hoppers from the high level to the low level, for the purpose of transferring coal from railway wagons on the high level to carts on the low level in the station.

(j) The fixed signals ceased at a point on the railway incline, and the last mile, half-mile, or quarter-mile posts upon the lines within the said station were at the bottom of the incline.

(k) The station was equipped with electric and hydraulic capstans for hauling wagons and cranes for handling goods. At the south end of the yard there was an overhead travelling crane carried on timber uprights for loading and unloading heavy goods into or from railway wagons and from or into carts.

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Access to the station for carts was obtained by gateways from Great Howard Street, the Dock Road, and Blackstone Street. The cartways were properly constructed and paved with stone. The coal yards on either side of Blackstone Street were also used for carting, and had suitably paved surfaces.

(l) In addition to a number of small cabins, huts, offices, &c., there were several private works and warehouses abutting on the yard, some of which had special sidings connected with the general system. These premises together with the sidings connected therewith were separately assessed, and were not the subject of this case.

(m) The premises were used for the receiving and forwarding of goods by the company's railway, the general rule being for the goods to go direct from the cart into the wagons and vice versa. To a small extent the premises were used for the storage of goods intended for transit or after goods had been received and before delivery had been taken thereof by the consignees. The time over which free storage might extend was fourteen days. "Storage" meant storage in transit for periods varying from fourteen days to an hour or two.

Paragraph 17 of the case stated that it was proved to the satisfaction of the recorder that the parts of the station numbered 1 to 9 above were required and used for the purpose of the receipt, conveyance, and delivery of goods to be carried on the company's railway in the course of their business as a railway company and as common carriers; that the conveyance of goods in wagons upon the company's railway from and to the position in which the same were loaded or unloaded in and from railway wagons could not be conveniently effected without the said parts of the station, and that the same were not in excess of what was reasonably necessary for the purpose of such traffic as aforesaid.

Subject to anything hereinbefore stated, none of the said parts of the station were used for storage purposes, except that as a necessary incident in the receipt, conveyance, and delivery of the goods which were sent from or arrived at the station some goods from time to time remained for short periods on the loading ways and platforms until they were sorted and loaded on to the railway wagons or into carts or lorries for delivery to the consignees.

The company's powers to acquire the lands comprised in the said station, and to construct the buildings, railways or sidings, fixtures, and erections which were upon the said land were contained in the Lancashire and Yorkshire Railway (Liverpool Dock Branches) Act, 1854 (17 & 18 Vict. c. lviii.), with which was incorporated the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20). The material sections of the former Act were ss. 4, 5, 12, and 13.

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It appeared to the recorder, after having viewed the station, that the said station, together with the buildings, railways or sidings, fixtures and erections thereon, was made by the company under the powers of their said Act of 1854.

GREAT HOWARD STREET GOODS STATION.

Paragraph 26 of the case was as follows :—It was agreed between the parties that the lands, buildings, and other erections and fixtures comprising the said station, as included in the poor rate valuation list, were to be treated for the purposes of the appeal as divided into the different parts hereunder mentioned, and that the total rateable value should be distributed between such parts in the amounts hereunder mentioned :

Schedule B.

1. The roof over lines directly productive	£143
2. The roof over loading platforms or mounds	75
3. The roof over loading ways or roads	244
4. The loading ways or roads and the land thereunder	2716
5. The loading platforms or mounds and the land thereunder	755
6. Sidings and turntables and the land thereunder	564
7. Hoist houses and lands thereunder, hoists, capstans, and their machinery	879
8. Approach roads to loading ways or roads and the land thereunder	264
9. Buildings and land thereunder and premises other than above	2705
Total rateable value	<u>£8345</u>

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The company claimed that they were entitled to be rated at one fourth only of the rateable value of items numbered 1 to 8 inclusive in the above schedule.

The following was a description of the Great Howard Street Goods Station (as stated in paragraph 29 of the case):—

(i.) The Great Howard Street Goods Station lay between Great Howard Street and Pall Mall, to the north of Leeds Street, in the parish of Liverpool. It was situated on the ground level, and adjoined the company's main line, which was on a high level supported on piers and arches about 22 feet 6 inches in height above the level of the ground.

(ii.) The elevation to Great Howard Street was substantially built, with openings in the walls, which were used for the purpose of admitting carts and lorries. These openings could be closed when necessary by sliding gates, which excluded the public from the depot.

(iii.) Inside those walls was the goods station, covering an area of about $12\frac{1}{2}$ acres, and containing sheds, lines of rails, sidings, wagon hoists, loading platforms or mounds, roadways, offices and workshops, &c., and the plant and appliances for handling goods and moving wagons into positions where they were required. The station comprised the several parts mentioned in schedule B to paragraph 26.

(iv.) The goods station was physically connected with the main line of railway, so far as the transit of goods was concerned, by lines of rails on an incline, and by eight wagon hoists. These wagon hoists were contained in substantial structures of brick-work, and four of the hoists were worked by electric power and four by gravitation in which full wagons lowered down lifted up the empty ones. The floors of the hoists were provided with fixed rails on which the wagons ran.

(v.) Locomotive engines did not go up or down the said incline. Wagons loaded and empty came down the said incline, but all wagons going up, whether loaded or empty, were taken up by means of the said hoists, the structure of the said incline being considered to be of insufficient strength.

(vi.) The station was provided with a network of lines of rail

connected with the wagon hoists and incline, making every portion of the yard accessible by rail. C. A.
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(vii.) There were numerous turntables worked by electricity, provided at the various points in the station for working the traffic. LANCASHIRE
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(viii.) The lines were also continued on the level across Chadwick Street, Little Howard Street, and Spranger Street to the coal yard in Great Howard Street.

(ix.) On the west or Great Howard Street side there was a substantially built shed, 380 feet long and 165 feet wide, covering about 1½ acres, and known as the "cotton shed." The shed was required and used for the protection from the weather of merchandise, which was loaded or unloaded from or into carts or lorries into or from railway wagons. A large proportion of such merchandise passed direct from wagon to cart or vice versa, and the residue was put on the loading mounds and was generally taken away the same day. The roof was covered with slates and glass and supported on iron columns. It was sufficiently high to permit of the working of hoisting jiggers and to swing goods as required. The jiggers were fixed at frequent intervals, attached to the underside of the roof, the motive power being received from a line of shafting attached to the roof. They were operated by men stationed on elevated gangways running along the whole length of the shed. Inside the shed were railway lines, loading ways or roads, loading platforms or mounds, turntables and capstans. The sides of the shed were boarded up, except the lower portion which was open to permit carts passing in and out. At each end of the shed was an elevated office, formed by framing in part of the upper portion.

(x.) The loading mound adjoining the said "cotton shed" was used occasionally for storing returned cotton, pending acceptance by the consignor, or in case of dispute pending the result of an arbitration. Such cotton generally remained there for two or three days, but in some cases for a week or two.

(xi.) Adjoining the cotton shed was a cotton yard, provided with lines or rails, cranes and capstans, with roadways between the lines for carts to draw alongside the trucks.

(xii.) The premises also included two warehouses known as the

C. A. "Yorkshire" and "East Lancashire" warehouses, which were
1913 substantially built brick buildings, four storeys high, 102 feet
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(xiii.) The premises also comprised another warehouse at the corner of Chadwick Street and Great Howard Street and known as Earle's warehouse. This was a three-storey building, 190 feet long and 85 feet wide. No claim for exemption was made by the company in respect of the three last-mentioned warehouses.

(xiv.) Adjoining the yard was an inclined structure (being the incline above referred to) on which was a single line of railway connecting this yard with the company's main line.

(xv.) The trains containing the goods from this station were made up and marshalled on the high level, and the wagons to make up such trains were sent up singly by means of the hoists.

(xvi.) The fixed signals ceased at a point on the high level railway, and there were no mile, half-mile, or quarter-mile posts upon any of the low level lines within the said station. The last post was the 36 mile post on the high level near the rounded corner of Chadwick Street.

(xvii.) The main line was at a higher level than the goods station, and was carried on iron girders and columns, the space below being laid out as a platform used principally for the loading and unloading of goods into or from wagons. On a small portion, in respect of which the company did not claim exemption, it was the practice of the company to keep rolls of paper and other goods till fetched away by the consignees, who were entitled to fourteen days free storage. The company kept the paper for an average of four or five days.

(xviii.) Entrances for carts were provided in Great Howard Street, Chadwick Street, and at the corner of Leeds Street. Carts were not, however, confined to any particular area, but traversed practically the whole of the station in all directions.

(xix.) In addition to the foregoing, the goods station contained several buildings, such as electric power house, engine and boiler houses, repair shops, stores, general offices, and numerous small cabins, &c., distributed throughout the premises in respect of which no claim for exemption was made.

(xx.) The premises were used for the receiving and forwarding of goods by the company's railway, the general rule being for the goods to go direct from the cart into the wagon and vice versa. To some extent the premises were used for the storage of goods intended for transit, or after goods had been received and before delivery had been taken thereof by the consignees. "Storage" meant storage in transit, i.e., for periods varying from fourteen days down to an hour or two.

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Paragraph 30 of the case stated that it was proved to the recorder's satisfaction that the parts of the said station numbered 1 to 8 above were required and used for the purpose of the receipt, conveyance, and delivery of goods to be carried over the company's railway in the course of their business as a railway company and as common carriers; that the conveyance of goods in wagons upon the company's railway from and to the position in which the same were loaded or unloaded in and from railway wagons could not be conveniently effected without the said parts of the said station, and that the same were not in excess of what was reasonably necessary for the purpose of such traffic as aforesaid.

Subject to anything hereinbefore stated none of the said parts of the said station were used for storage purposes, except that as a necessary incident in the receipt, conveyance, and delivery of the goods which were sent from or arrived at the station some goods from time to time remained for short periods (not exceeding fourteen days) on the loading ways and platforms until they were sorted and loaded on to the railway wagons or into carts or lorries for delivery to the consignees.

The company's powers (if any) to acquire the lands comprised in the said station and to construct the buildings, railways or sidings, fixtures and erections which were upon the said land were contained in the Liverpool and Bury Railway Acts, 1845 (8 & 9 Vict. c. clxvi.), ss. 14, 15, 21, and 1846 (9 & 10 Vict. c. cccxii.), ss. 8, 9; Manchester and Leeds Railway (No. 3) Act, 1847 (10 & 11 Vict. c. clxiii.), s. 18; Lancashire and Yorkshire Railway Acts, 1852 (15 & 16 Vict. c. cxxxii.), recital and s. 4; 1882 (45 & 46 Vict. c. clxii.), ss. 5, 6; and 1883 (46 & 47 Vict. c. clxix.), ss. 26, 27; Lancashire and Yorkshire Railway (New

C. A. Works and Additional Powers) Act, 1872 (35 & 36 Vict. c. cxvi.),
1913 ss. 9, 24; and Railways Clauses Consolidation Act, 1845 (8 & 9
Vict. c. 20).

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It appeared to the recorder, after having viewed the station, that the station, together with the buildings, railways or sidings, fixtures and erections thereon, was made by the company under the powers of the said Acts.

The contentions of the company were as follows :—

That the said parts of the said North Docks Station numbered 1 to 9 in schedule A and each of such parts, and the said parts of the said Great Howard Street Goods Station numbered 1 to 8 in schedule B and each of such parts, consisted of “land used as a railway made under the powers of an Act of Parliament for public conveyance” within the meaning of s. 36, sub-s. ii., of the Liverpool Corporation Act, 1893, for the following reasons (*inter alia*):—

(1.) Because the company had power under the said Acts of Parliament to acquire the land upon which the said parts of the said stations were constructed for the purpose of making a railway thereon and/or for extraordinary purposes and to construct thereon each and every of the said parts.

(2.) Because it was to be presumed on the principle *omnia præsumuntur rite esse acta* that the company had duly acquired the said land and constructed the said parts under the powers in that behalf contained in the said Acts.

(3.) Because the public conveyance of goods upon the said railway commenced or ended, as the case might be, from or at the point in the said stations respectively where the wagons were loaded or unloaded.

(4.) Because the said parts were and each of them was upon the evidence constructed, required, and used for the conveyance of goods by railway and/or for purposes reasonably necessary and incidental thereto.

The contentions of the corporation were as follows :—

(1.) That as to the North Docks Goods Station there was no evidence that any single item of those numbered 1 to 9 in schedule A was

(a) a railway made under the powers of an Act of Parliament for public conveyance;

(b) used as such a railway ;

(c) used only as such a railway.

(Item No. 7 in schedule A was admitted by the corporation to be entitled to the exemption claimed, and no exemption was claimed in respect of item No. 10.)

(2.) That as to the Great Howard Street Goods Station there was no evidence that any single item of those numbered 1 to 8 in schedule B was

(a) a railway made under the powers of an Act of Parliament for public conveyance ;

(b) used as such a railway ;

(c) used only as such a railway.

(In respect of item No. 9 in schedule B no exemption was claimed by the company.)

(3.) That the properties in question, both at North Docks and Great Howard Street, were auxiliary works ancillary to the business of the company as carriers (see *Hall & Co. v. London, Brighton, and South Coast Ry. Co.* (1) and *Sowerby & Co. v. Great Northern Ry. Co.* (2)).

(4.) That land used as a railway constructed under the powers of an Act of Parliament for public conveyance was required by statute to be measured by mile posts, half-mile posts, and quarter-mile posts, and to be furnished with adequate signalling appliances ; that the mile, half-mile, and quarter-mile posts ended on the high level, and that there were no such posts either in the North Docks Goods Station or in the Great Howard Street Goods Station, both of which goods stations were on the low level ; and that there were not in the said goods yard any such signalling appliances as were required to be used on a railway for public conveyance.

(5.) That a railway for public conveyance was one on which complete and fully marshalled trains were able to travel over its entire length, and that lines which were so situated that fully equipped trains were unable to pass over them directly from the point where they were loaded to their destination could not be held to be a railway for public conveyance or to be constructed under the powers of an Act of Parliament for public conveyance.

(1) (1885) 15 Q. B. D. 505.

(2) (1891) 7 Ry. & Ca. Tr. Cas. 156.

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(6.) That in the case of the North Docks Goods Station the five lines of railway which ran through the station were specific railways, and did not include any of the ancillary works which formed the goods station.

(7.) That with respect to the North Docks Goods Station the railways to which locomotives from the main line could obtain access were already granted partial exemption, either by being included in the premises first described in the rate (consisting of certain lines of railway as to which no question arose on the appeal) or in item 7 of schedule A, and that locomotives from the main line could not obtain access to any of the other railways in the station, which could only be approached through turntables not capable of use by any but small locomotives specially employed in the goods station.

(8.) That in the case of the North Docks Goods Station, which was alleged to have been constructed under the powers of the Lancashire and Yorkshire Railway (Liverpool Dock Branches) Act, 1854, the limits of deviation, as regulated by the Railways Clauses Act, had been exceeded, and that the station was therefore not part of a railway constructed under the powers of an Act of Parliament for public conveyance.

(9.) That in the case of the Great Howard Street Goods Station none of the Acts of Parliament produced by the company authorized a low level railway, but only high level railways.

(10.) That with respect to the Great Howard Street Goods Station locomotives being unable to pass from the main line to the station, or vice versa, and the only way of transferring loaded wagons from the station to the main line being by means of the hydraulic lifts described above, this station was altogether cut off and separated from the main line of the company, being situated at a lower level than the main line.

(11.) That there was no evidence that any single item, either at North Docks or Great Howard Street, had been constructed within the time limited for completion under the Acts of Parliament, or that even the land had been bought under statutory powers.

(12.) That in regard to the premises at Great Howard Street a large part of the land was proved to have been bought by

private treaty two years after the time at which by the Act of Parliament authorizing its construction the period for completion had expired.

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The recorder held, as to the North Docks Goods Station, that the parts numbered 1 to 9 inclusive in schedule A, and, as to the Great Howard Street Goods Station, that the parts numbered 1 to 8 inclusive in schedule B, of the said rateable hereditaments were each of them land in respect of which the company were entitled to be rated on one fourth part of the net annual value thereof under s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893. He accordingly allowed the appeal.

The question for the opinion of the Court was whether upon the facts hereinbefore stated the recorder was wrong in law in holding as to each or any and which of the said parts of the said stations that the same were rateable at one fourth only of their rateable value.

1912. May 1, 2. *Leslie Scott, K.C. (Ryde, K.C., and G. Cohen with him)*, for the respondents. (1) None of the items specified in the notice of appeal to quarter sessions (except item 7, which is the subject of an agreement between the parties) ought to be rated to the general rate at one fourth only of the net annual value thereof under s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893. None of those items come within the words "land used only as a railway made under the powers of any Act of Parliament for public conveyance." The word "and" in that sub-section in the sentence "or any land covered with water and used only as a dock or a canal, or the towing path thereof, or as a railway," &c., must be a mistake for "or," otherwise it would read land covered with water and used only as a railway. The language of this sub-section is similar to that which was used in s. 88 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), in s. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), and in s. 211, sub-s. 1 (b), of the Public Health Act, 1875 (38 & 39 Vict.

(1) The words "respondents" and "appellants" are used throughout the case to signify the position of the parties on the appeal to quarter sessions.

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c. 55), in all of which the word is "or." To bring the case within s. 36, sub-s. (ii.), the land must be used only as a railway, and the railway must have been constructed under the powers of an Act of Parliament: *North Eastern Ry. Co. v. Leadgate Local Board*. (1) It must also be used only "for public conveyance." These latter words refer to the business of railway companies as conveyers of goods and passengers along the railway from one point to another as contrasted with their business of carriers, in which latter capacity a railway company collect, warehouse, and deliver goods, and build stations and warehouses for that purpose. This distinction was first pointed out in the argument in *Hall & Co. v. London, Brighton, and South Coast Ry. Co.* (2), where the meaning of the words "convey" and "conveyance" as used in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), was discussed. In that case Wills J. pointed out, at pp. 536, 537, that a railway company might simply take tolls for the use of the line of railway by other people with their own carriages and locomotives, which was the earliest notion of a railway, or the railway company might provide the engines and carriages, being mere conveyers, and not carriers having warehouses and sheds where goods are received; or the railway company might be carriers, providing the necessary warehouses and accommodation. That judgment shews what is meant by "conveyance." The judgment of Wills J. in that case was approved in the Court of Appeal in *Sowerby & Co. v. Great Northern Ry. Co.* (3), where Lord Halsbury L.C. distinguishes between the business of a railway company as mere conveyers from point to point and their business as carriers where they provide various accommodation services. In *South Wales Ry. Co. v. Swansea Local Board* (4), which was decided under s. 88 of the Public Health Act, 1848, it was held that the partial exemption extended to the line of railway and the sidings and turntables, and so much of the land at the side as was necessary for the support of these, and also so much of the platform as was of the same width as the side of the railway adjacent, but that the stations, offices, and

(1) (1870) L. R. 5 Q. B. 157.

p. 170.

(2) 15 Q. B. D. 505.

(4) (1854) 4 E. & B. 189; 24 L. J.

(3) 7 Ry. & Ca. Tr. Cas. 156, at (M.C.) 30.

warehouses which were ancillary to the railway properly so called, although necessary for the convenient working of traffic upon it, were not part of the railway and ought to be assessed at their full net annual value. As Lord Campbell said in that case (1), "the line itself, the sidings, and the turntables on which the carriages actually go, and so much of the land at the side as is occupied for the necessary support of these are, in every sense, part of the railway." Therefore, whatever is part of the railway regarded as a running line is entitled to the exemption, and the reason for allowing the exemption in such a case is that the railway proper receives less benefit from the expenditure of the general rate than those parts of the railway company's premises which come into existence for the purpose of their business as carriers, just as land covered with water receives less benefit. No doubt the point as to the meaning of the word "conveyance" was not taken there, but there is an indication given of the distinction between the business of the railway company as "conveyers" and their business as "carriers." The Court were there discussing the meaning of "land used only as a railway" but the underlying principle supports the contention of the corporation in the present case. In *Midland Ry. Co. v. Birmingham Borough Council* (2), where certain sidings and turntables, occupying about ten acres of land, which were used for loading trucks and carriages with goods and also as a standing place for laden and unladen carriages, and which were necessary for conducting the traffic of the railway, were held to come within the partial exemption, Mellor J., purporting to follow the decision in *South Wales Ry. Co. v. Swansea Local Board* (3), said that not only the actual lines of railway necessary for carrying the traffic from one place to another, but also the turntables and sidings which were necessary for conducting the traffic of the railway, were within the exemption. That principle goes too far, and is not borne out by the decision in the *Swansea Case*. (3) The judgment in that case was based upon the finding of fact in the special case that the sidings and turntables were all necessary for conducting the traffic of the railway. In *London and North*

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(1) 4 E. & B. at p. 195.

(2) (1865) 13 L. T. 404.

(3) 4 E. & B. 189; 24 L. J. (M.C.) 30.

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Western Ry. Co. v. Llandudno Improvement Commissioners (1) it was held that the roof covering the railway, the roof covering the platform, the roof covering the sidings, and the platforms, both under the roof and uncovered, were within the partial exemption; but that the roof covering the cab drive, the roof covering the buildings, the cab drive under the roof, the cab drive and horse landing uncovered, the cattle-landing and pens, and the crane in the goods yard were rateable at the full value. The decision in that case, which went very far, does not support the contention that those parts of the railway company's premises which came into existence for the purpose of their business as carriers are within the exemption. Again in *Williams v. London and North Western Ry. Co.* (2) the same distinction is apparent between the railway proper, that is, the lines of railway connecting one place with another, and the premises which are ancillary to the carriers' business.

[LORD ALVERSTONE C.J. The result of the authorities is summed up in Browne and Theobald on Railways, 4th ed. p. 778.]

The railway must be used for "public conveyance," and none of the items in paragraph 13, schedule A, except item 7, and none of the items in paragraph 26, schedule B, of the case come within that description. Sect. 36 of the Liverpool Corporation Act, 1893, is a general charging section and lays the burden of the general rate upon all land, and it grants a special exemption. Those who say that they are within the exemption must prove it. [*Newport Dock Co. v. Newport Local Board* (3) and *Stockport Union v. London and North Western Ry. Co.* (4) were also referred to.]

Next, the low level railway at Great Howard Street Station was not "made under the powers of any Act of Parliament" within the meaning of s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893. The railway was not constructed under the express powers given by any of the railway company's special Acts. The decision of the recorder was therefore wrong.

(1) [1897] 1 Q. B. 287.

(2) [1900] 1 Q. B. 760.

(3) (1862) 2 B. & S. 708.

(4) (1897) 66 L. J. (Q.B.) 781;

(1898) 67 L. J. (Q.B.) 335.

E. Page, K.C. (F. Greer, K.C., and Konstam with him), for the appellants. The contention on the other side that the words "public conveyance" mean the conveyance of traffic on the railway from one point to another, and that that is the meaning of the word "conveyance" not only in the Railways Clauses Consolidation Act, 1845, but also in the Public Health Acts and the various local Acts containing the same exemption as that contained in s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893, is based upon *Hall & Co. v. London, Brighton, and South Coast Ry. Co.* (1) But Wills J., who gave the principal judgment in that case, was a party to the subsequent decision in *London and North Western Ry. Co. v. Llandudno Improvement Commissioners* (2), and therefore it cannot be said that the decision in the earlier case had the effect of narrowing the exemption in the way suggested. Even if "conveyance" has the limited meaning suggested in the Act of 1845, it does not follow that the word has that limited meaning in s. 211 of the Public Health Act, 1875, or s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893, which were passed for a totally different purpose. In other Acts the words "conveying" and "carrying" are used interchangeably as having the same meaning. For instance, s. 2, sub-s. 1, of the Conveyance of Mails Act, 1893 (56 & 57 Vict. c. 38), enacts that every tramway company shall, if required by the Postmaster-General, perform all such reasonable services in regard to the conveyance of mails as the Postmaster-General from time to time requires. Mails are carried by railway and tramway companies as carriers, and they are not conveyed upon the railway or tramway under the conveying or hauling sections of the Railways Clauses Consolidation Act, 1845. The section then proceeds to deal with the case of mails being carried in or upon a carriage conveying passengers, shewing that the word "conveyance" is used sometimes as meaning merely conveying in the limited sense and sometimes as meaning carrying as carriers. Therefore the words in s. 36, sub-s. (ii.), of the Liverpool Corporation Act, 1893, "railway made for public conveyance" mean a railway made for the purpose of having carried over it for reward either goods or passengers whether

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(1) 15 Q. B. D. 505.

(2) [1897] 1 Q. B. 287.

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those goods or passengers are carried under the conveying sections (ss. 86—107) of the Act of 1845, or are carried by the railway company as carriers. If that is so, every line of railway which is essential to enable the railway company to perform their contracts of carriage are lines of railway made for public conveyance, and therefore everything adjoining those lines which is not merely convenient but which is absolutely necessary for the work of those lines is equally within the words "railway made for public conveyance." The case of *London and North Western Ry. Co. v. Llandudno Improvement Commissioners* (1) is a clear authority that all the items claimed here come within the partial exemption, and there must have been some peculiar circumstances in that case with regard to the cattle pens to exclude them from the exemption. The contract of carriage is to convey from one place to another, and that contract of carriage is not completed until the truck or carriage comes to a standstill at the place of destination. The conveyance begins when the consignor hands the goods at the station to the railway company, and ends when the railway company hands the goods at the other end to the consignee. The exemption has been gradually extended, and in *London and North Western Ry. Co. v. Llandudno Improvement Commissioners* (1) it was decided that the passenger platform, which was necessary for the use of the railway, adjoining the line was exempt. A cattle platform adjoining a cattle line is in a similar position to a passenger platform adjoining a passenger line. It is the duty of a railway company to convey, and everything which is essential for the purpose of enabling them to perform their duty of conveyance is "railway" within the meaning of the Acts granting this exemption. The recorder has applied the right test as laid down by Mellor J. in *Midland Ry. Co. v. Birmingham Borough Council* (2), and he has found that those things are not in excess of what is reasonably necessary for conducting the traffic of the railway. That is found as a fact, and it is really a question of fact for him. Everything which is absolutely necessary for the purpose of the conduct of the traffic is part of the railway; for instance, a passenger platform is, in consequence

(1) [1897] 1 Q. B. 287.

(2) 13 L. T. 404.

of legislation, necessary for a railway company to have, and goods and cattle platforms which are absolutely necessary are also part of the railway. The railway company do not claim exemption for a ticket office, waiting room, refreshment room, or lavatory. A roof over a goods platform is necessary to protect the goods from the weather, as the railway company are bound to carry at any rate with reasonable care. If what is below, whether lines or platforms, is exempt, the roof is exempt. The roof cannot be treated as a separate subject-matter of assessment; it can only be looked at separately for the purpose of ascertaining its value. If the conveyance begins directly the goods are handed over to the railway company, part of the carriage is performed by the goods being lifted into the trucks, part by their being taken in the trucks to the place of destination, and part by their being taken out of the trucks at that station by lifts or other means. All those operations are included in the carriage of the goods. Before the wagon is brought to the place in the station where it has to be unloaded it has been over a running line, and the railway company are entitled, in addition to a charge for carriage, to make a further charge for unloading. It is impossible to find any satisfactory test except that which is laid down in *Midland Ry. Co. v. Birmingham Borough Council* (1), namely, that which is reasonably necessary for the purpose of conducting the traffic of the railway. In *Stockport Union v. London and North Western Ry. Co.* (2) a line ordinarily called a siding was held to be a running line, because the charge for conveyance covered the conveying over that line. The recorder adopted the right test, and his decision should be affirmed.

With regard to the point that the low level lines were not "made under the powers of any Act of Parliament," these lines were constructed under the powers of s. 16 of the Railways Clauses Consolidation Act, 1845, which is incorporated in the special Acts, under which the railway company have power to make stations on land which they have power to take; and under s. 45 the railway company have power to take land by agreement for

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additional stations. It makes no difference whether the sidings are alongside the line or over or under it, if the railway company have acquired power to take sufficient land for the purpose.

With regard to the hoists, they occupy the place of a turntable where the lines are on different levels. The hoists work perpendicularly, whereas turntables work horizontally. A railway company is entitled, under s. 86 of the Railways Clauses Consolidation Act, 1845, to use and employ locomotive engines or other moving power.

Ryde, K.C., in reply. There is no doubt that the stations and other accommodation works were constructed under the powers of the Railways Clauses Consolidation Act, 1845, which is incorporated in the railway company's special Act. But they are not part of the "railway." The principle is that nothing except the railway constructed for public conveyance from one point to another is entitled to the partial exemption.

Cur. adv. vult.

1912. May 9. The judgment of the Court (Lord Alverstone C.J., Pickford and Avory JJ.) was delivered by

AVORY J. The appellants at quarter sessions claimed under the second proviso to s. 36 of the Liverpool Corporation Act, 1893, to be rated at one fourth only of the rateable value of certain items of their property numbered 1 to 9 inclusive in schedule A, paragraph 13, and 1 to 8 inclusive in schedule B, paragraph 26, of the special case, and the question raised for decision in this Court is whether the exemption in that proviso applies to all or any and which of such items. A similar exemption in the Public Health Acts of 1848 and 1875, and in various local Acts, has been the subject of decision in the cases which have been discussed before us. We do not think it is possible to reconcile these decisions, and it becomes necessary, therefore, to ascertain the true principle of the exemption and to determine the extent of its application to the items in dispute in this case. The exemption in terms applies to "any land used as a railway," or it may be read "used only as a railway, made under the powers of any Act of Parliament for public conveyance."

It was contended before us and at quarter sessions that the appellants had not shewn that the works described in schedules A and B were part of a railway made under the powers of any Act of Parliament for public conveyance. We think it was established that the whole of the works in schedules A and B were made under the powers of the appellants' private Acts and the Railways Clauses Consolidation Acts, and that the railway was for public conveyance, but the question remains whether the particular items or any of them fall within the description of land used as a railway within the meaning of this section.

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The respondents admitted that the sidings and turntables and land thereunder in item No. 7 of schedule A were entitled to the exemption, and the recorder at quarter sessions has held that all the other said items were also within it on the ground, as appears in paragraphs 17 and 30 of the special case, that they are parts of the stations required and used for the purpose of the receipt, conveyance, and delivery of goods to be carried on the appellants' railway in the course of their business as a railway company and as common carriers, and that the same are not in excess of what is reasonably necessary for the purpose of such traffic. This decision we think goes beyond any of the previous cases, and cannot be supported. In our opinion the exemption must be limited to land used as a railway as distinguished from land used for works and conveniences or for the purposes of a railway company which include the business of a carrier. This distinction appears in all railway Acts authorizing the construction of railways, and unless it is applied to this exempting clause it is difficult to see on what ground station buildings have always been admitted to be excluded from the exemption.

This interpretation of a similar exemption was adopted by this Court in the cases of *South Wales Ry. Co. v. Swansea Local Board* (1) and *Midland Ry. Co. v. Birmingham Borough Council* (2), in which the exemption was held to extend to the line of railway and so much of the land on either side as was necessary for its physical construction, and to the sidings and turntables which might be considered and were treated as part of the running line. The decision of the Court in the case of *London and North*

(1) 4 E. & B. 189.

(2) 13 L. T. 404.

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Western Ry. Co. v. Llandudno Improvement Commissioners (1), which to some extent supports the judgment of the learned recorder in this case, carried the exemption in our opinion beyond the true principle laid down in the earlier cases; and applying that principle to the present case we think that the whole of the items Nos. 1 to 9 inclusive, except No. 7, in schedule A, and the whole of the items Nos. 1 to 8 inclusive in schedule B, ought to be excluded from the exemption.

Further with respect to the items Nos. 1 to 8 in schedule B, including No. 6, "sidings and turntables and the land thereunder" described as parts of Great Howard Street Goods Station, having regard to the facts stated in paragraph 29 of the special case, we think that they are governed by the decision of the Court of Appeal in *Williams v. London and North Western Ry. Co.* (2), that they are not part of the railway in the ordinary sense, and that these sidings and turntables cannot be considered as part of the running line.

The judgment of the learned recorder therefore must be reversed and the appeal to quarter sessions dismissed with costs here and below.

Appeal allowed.

W. F. B.

The railway company appealed.

1913. Jan. 14, 15, 16. *Balfour Browne, K.C., and Page, K.C.* (*Greer, K.C., and Konstam* with them), for the appellants.

Leslie Scott, K.C., and Ryde, K.C. (*Wooll* with them), for the respondents.

The arguments were the same as in the Divisional Court.

The following additional cases were cited:—*Reg. v. Eastern Counties Railway* (3); *London, Brighton, and South Coast Railway v. Truman* (4); *Adamson v. Edinburgh and Glasgow Railway* (5); *Purser v. Worthing Local Board* (6); *Smith v. Richmond* (7);

(1) [1897] 1 Q. B. 287.

(4) (1885) 11 App. Cas. 45.

(2) [1900] 1 Q. B. 760.

(5) (1855) 2 Macq. 331.

(3) (1863) 32 L. J. (M.C.) 174.

(6) (1887) 18 Q. B. D. 818.

(7) [1898] 1 Q. B. 683.

Metropolitan Electric Tramways v. Tottenham Urban Council (1); C. A.
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1913. May 9. VAUGHAN WILLIAMS L.J. read the following judgment:—The questions we have to decide in this case are set forth in paragraph 40, appearing on p. 36 of the special case stated for the opinion of the Court by the learned Recorder of Liverpool.

The question for the Court is : “ whether upon the facts herein stated I was wrong in law in holding :—(1.) As to each or any and which parts of the said North Docks Goods Station numbered 1 to 9 inclusive in the schedule to paragraph 13 hereof, that the same were rateable at one fourth only of their rateable value. (2.) As to each or any and which of the said parts of the said Great Howard Street Goods Station numbered 1 to 8 in the schedule to paragraph 26 hereof, that the same are rateable at one fourth only of their rateable value.” The parts in dispute of the North Docks Goods Station 1 to 9 inclusive are set out at p. 6 of the special case in the schedule to paragraph 13.

The following is the schedule :—

SCHEDULE A.

Description.	Net Annual Value.
1. The roof over lines directly productive	£357
2. The roof over loading platforms and mounds	190
3. The roof over loading ways or roads	320
4. The loading ways or roads and the land thereunder	654
5. The loading platforms or mounds and the land thereunder	399
6. Cattle loading platforms or mounds and the land thereunder	162
7. Sidings and turntables and the land thereunder	789
8. Hoist houses and the land thereunder, hoists, capstans and their machinery and cranes	51
9. Approach roads to loading ways or roads and the land thereunder	437

(1) [1912] 2 K. B. 216. (2) [1896] 1 Ch. 418.
(3) [1907] 1 Ch. 550.

C. A. As to item 7 in this schedule, "sidings and turntables and
1913 the land thereunder," it is said on behalf of the railway company
LANCASHIRE that it was conceded in law by the corporation that the "sidings
AND and turntables and the land thereunder" were exempted from
YORKSHIRE the full rate, and liable in respect of only one fourth, and that
RAILWAY this concession in law covered the "sidings and turntables and
v. land thereunder" mentioned in schedule B which relates to the
LIVERPOOL Great Howard Street Station, whereas the corporation say that
CORPORATION the concession in respect of item 7 was not a concession in law,
— but a concession in fact for the sake of peace to avoid discussion
Vaughan of details.
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Before dealing with other matters I will notice the argument which Mr. Balfour Browne urged. It was based upon the statutory confirmation under the Railway and Charges No. 10 (Lancashire and Yorkshire Railway, &c.) Order Confirmation Act, 1892 (55 & 56 Vict. c. xlviii.), confirming the provisional order of the Board of Trade under the Railway and Canal Traffic Act, 1888, embodying the classification of merchandise traffic and the authorized schedule of maximum rates and charges, s. 2 of which schedule provides the maximum rate the company may charge for conveyance, and s. 3 provides for the maximum charges in respect of station terminals, and s. 4 for the maximum charges in respect of service terminals. Sect. 3 is, "The maximum station terminal is the maximum charge which the company may make to a trader for the use of the accommodation (exclusive of coal drops) provided, and for the duties undertaken by the company for which no other provision is made in this schedule, at the terminal station for or in dealing with merchandise, as carriers thereof, before or after conveyance." Sect. 4 is, "The maximum service terminals are the maximum charges which the company may make to a trader for the following services when rendered to or for a trader, that is to say, loading, unloading, covering and uncovering merchandise, which charges shall, in respect of each service, be deemed to include all charges for the provision by the company of labour, machinery, plant, stores and sheets. Provided that, where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the company, the company may not charge to a trader any

service terminal for the performance by the company of any of the said services if the trader has requested the company to allow him to perform the service for himself and the company have unreasonably refused to allow him to do so. Any dispute between a trader and the company in reference to any service terminal charged to a trader who is not allowed by the company to perform for himself the service shall be determined by the Board of Trade."

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These provisional orders of the Board of Trade as recited in each order are made under the powers of the Railway and Canal Traffic Act, 1888.

The recital is as follows: "Whereas under the Railway and Canal Traffic Act, 1888, the Board of Trade embodied in a provisional order the classification of merchandise traffic and schedule of maximum rates and charges, including all terminal charges which, in the opinion of the Board of Trade, ought to be adopted by the Lancashire and Yorkshire Railway Company, and the railway companies connected therewith which are specified in the schedule to the said provisional order: And whereas it is expedient that the provisional order, as set out in the schedule to this Act annexed be confirmed by Act of Parliament."

Mr. Balfour Browne contended that as the amount of these terminals and the amount of the expenses incurred in earning them are parts of the general expenses of the line, and have in fact been treated as enhancing the rating of the Lancashire and Yorkshire line, the words "used as a railway made under the powers of an Act of Parliament for public conveyance" ought to be construed as wider than heretofore by reason of these orders of the Board of Trade confirmed by Act of Parliament. I cannot agree with this contention.

I propose, having disposed of that point, in the first instance, to deal simply with the question whether the decisions of the recorder in respect of the said parts of the North Docks Goods Station and of the Great Howard Street Goods Station were right or wrong in principle, and do not propose at present to deal with the individual parts. To my mind the real question which we have to decide is what is the meaning of the decision of the Court of Queen's Bench in the case of *South Wales Ry. Co. v. Swansea*

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Local Board (1), and, secondly, whether that decision has been overruled or materially modified by subsequent cases.

The Act of Parliament which had to be dealt with in the *Swansea Case* (1) was the Public Health Act, 1848 (11 & 12 Vict. c. 83), s. 88, which directs that district rates are to be assessed on the occupiers of all property rateable to the relief of the poor on the full net annual value of such property, and then contains a proviso that "the occupier of any land used as arable meadow or pasture ground only or as woodlands market gardens or nursery grounds and the occupier of any land covered with water or used only as a canal or towing path for the same or as a railway constructed under the powers of any Act of Parliament for public conveyance shall be assessed in respect of the same in the proportion of one fourth part only of such net annual value thereof." The proviso which I have just set forth is in substance identical with the second proviso to s. 36 of the Liverpool Corporation Act, 1893. It has always been held that the words "used only" apply not only to a canal but also to a railway.

Lord Campbell in his judgment says, "We are to consider what part of the premises is to be considered as land used as a railway," and goes on to say, "these premises do not fall within the proviso, and are to be rated at their full value unless they come within the description of land 'used only as a railway.' It seems to me that the line itself, the sidings, and the turntables on which the carriages actually go, and so much of the land at the side as is occupied for the necessary support of these, are, in every sense, part of the railway; and I think that so much of the platform as is of the same width as the side of the railway adjacent is, like it, to be considered as part of the railway. But I am of opinion that the rest of the property is liable to the full rate. As to the warehouses, it was scarcely contended that they could be considered part of the railway or entitled to the exemption. As to the other premises, we have not to consider whether they are, in the words of the case, 'necessary for the use and working of the railway as such, and connected and used therewith,' which no doubt the station is, but in the words of the Act whether they are 'used as a railway.' Now in common parlance

a distinction is made between the railway and the station. The matters enumerated, with the exceptions I have stated, are ancillary to the working of the railway, but are not part of it. I think, therefore, that on a fair interpretation of the language used by the Legislature, those things are not intended to fall within the exemption." For the better understanding of the judgment of Lord Campbell it is useful to enumerate the things in respect of which the exemption was claimed: stations, platforms, offices, engine sheds, warehouses, sidings, turntables, tanks, waterworks, cranes, and other fixed plant, buildings, machinery and works; and it is only in respect of the line itself, the sidings and the turntables on which the carriages actually go, and so much of the land at the side as is occupied for the necessary support of these, that Lord Campbell says are in every sense part of the railway, and in respect of the platforms he limits it by these words: "I think that so much of the platform as is of the same width as the side of the railway adjacent is, like it, to be considered as part of the railway." Wightman J. simply concurs with the judgment of the Lord Chief Justice, including his limitation of the part of the platform "of the same width as the side of the railway adjacent." Erle J. (1) concurs in the conclusion of Lord Campbell, including the limitations to part of the platform, as to which he says: "On the materials before us I agree it is better to hold that so much of the platform as rests on the land taken for the line of railway is within the favouring clause." The judgment was that the rate be amended accordingly. I do not see that there is any substantial difference between the report in 4 Ellis and Blackburn and that in 24 *Law Journal*, Magistrates' Cases, pages 34—35. In the *Law Journal* the words of Erle J. as to the platform are reported as follows: "Then we come to the offices and warehouses as to which I am clearly of opinion that they are not entitled to the exemption. They are proximately used for the purpose of habitation. The station here is in the middle of a large town and used for the arrival and departure of passengers and goods. These buildings have been erected under the powers of the Act for taking additional land beside that required for the line of

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(1) 4 E. & B. at p. 199.

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railway, and such buildings ought not to be exempted as part of the railway. I believe that the principle upon which we are now acting has been put into practice on many railways, viz., that buildings ancillary to the transit of passengers are rateable upon a different principle from the railway itself. It has never been judicially determined at what point that which is ancillary begins or ends; but the practice of rating may be referred to on this point, and that practice has treated stations, offices and warehouses as different from the railway. Therefore, on the materials now before us, I think it better to hold that where additional land has been taken, and buildings erected upon it, the company should be rateable for it at the full annual value."

This case has been considered in the subsequent cases of *Midland Railway v. Birmingham Borough Council* (1) and *North Eastern Ry. Co. v. Scarborough* (2) and *London and North Western Railway v. Llandudno Improvement Commissioners* (3), which I will now consider in detail.

In *Midland Railway v. Birmingham Borough Council* (1) it appears from the report that the railway company were the owners and occupiers of a railway made, under the powers of several Acts of Parliament, for public conveyance, part of which railway and of the lands, buildings, and works occupied therewith was situate within the borough of Birmingham; and part of this property consisted of lands occupied by certain sidings and turntables to the extent of about ten acres, which were used for loading trucks and carriages with goods when about to be conveyed on the railway, and for unloading them after such conveyance, and also as a standing place for loaded and unloaded trucks and carriages belonging to the railway company, while two of the sidings were used for the standing and unloading of trucks belonging to traders using the line. The sidings and turntables built, it is important to observe, on the land acquired under the special Acts were used in connection with the main lines of railway, and were found as a fact to be all necessary for conducting the traffic of the railway, and had been necessarily enlarged as the traffic increased. The sole question for the Court was

(1) 13 L. T. 404.

(2) (1869) 33 J. P. 244

(3) [1897] 1 Q. B. 287.

whether the land occupied by the sidings and turntables was entitled to the exemption conferred by the proviso to s. 129 of the Birmingham Improvement Act, 1857, which is in substantially the same language as s. 36 of the Liverpool Corporation Act, 1893. Mellor J. in answering the question says: "I am of opinion that our judgment should be for the appellants (the railway company) who upon the 129th section of the Improvement Act are entitled to be rated in respect of these sidings and turntables at one-fourth part only of their net annual value and at no higher rate. The term 'railway' in the Act is not confined to the two lines of rails necessary for carrying goods and passengers from one place to another. By the *Swansea Case* (1) it was determined . . . that the word 'railway' means not only the actual lines of railway, but also the turntables and sidings necessary for conducting the traffic of the railway. If the sidings are not necessary for conducting the traffic, but are made mainly for warehousing accommodation, they are rateable at their full annual value. There is no other limitation than what is necessary for the conduct of the business of the railway." I pause here to observe that it is, in my opinion, clear from the context that Mellor J. only means to use the word "business" in the narrow sense of "traffic" or "working of the railway proper," and not in the wider sense of the business of the undertaking. "We are relieved by the case from any difficulty, because these turntables and sidings are found to be necessary for the traffic of the railway . . . I agree with the *Swansea Case* (1), confirmed as it is by the subsequent case. If there is any excess of land occupied for the sidings and turntables, that is a matter for the sessions, not for this Court." Shee J. says: "I am of the same opinion. The question is whether the sidings and turntables come within the meaning of the proviso as 'land used only as a railway.' Does the proviso mean land occupied by the rails only on which goods and passengers are carried from place to place, or does it include land used for the purpose of turning carriages from one line to another by sidings and turntables? I think that it includes both descriptions of land. The *Swansea Case* (1) is an authority for the decision of this case. Mr. Brown pressed on us the consideration that there might be

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lines of railway in connection with the running lines for passengers, used only for the purpose of warehousing the carriages. If such a case came before us, probably it might be right not to include such in the reduced rating. That is not the case before us, because it is found in the case that these sidings and turntables were necessary for the working of the railway proper." It seems to me that there is no inconsistency between this case and the *Swansea Case* (1), and the learned judges referred to the decision of the *Swansea Case* (1) as establishing the proposition that "railway" does not mean merely the lines on which the traffic is taken from one place to another, but must be taken to include amongst other things sidings and turntables; but the Court in the *Birmingham Case* (2) was careful to point out that it was not all sidings which could be brought within the favouring proviso, but only such as were necessary for the traffic of the railway proper, and if the sidings were used substantially for e.g. warehouse purposes it could not be said that the land on which they stood was "used only as a railway," and it would therefore not be entitled to the exemption, even though acquired under the special Act. I do not think that the Court was extending the principle of the *Swansea Case* (1), and, on the contrary, I think that it was pointing out within what limits its principle was applicable to the subject-matter with which the Court was dealing, to wit, sidings and turntables constructed on lands acquired under the special Acts.

The next case to be considered is the case of the *North Eastern Railway v. Scarborough Local Board*. (3) This case is not very fully reported. It appears by paragraph 7 of the case that the railway company were rated as owners and occupiers of railway stations, waiting rooms, warehouses, sheds, yards and premises, hotels, coal depots, weigh house and yard, 716 yards main line, 2½ miles sidings. Paragraph 13 says the sidings, turntables, and platforms delineated on the said plan coloured blue (the plan is not included in the report) were respectively constructed under the powers of the Act of Parliament for the public conveyance of goods and passengers to their destination on and by the said railway, and are respectively necessary for the conducting of the

(1) 4 E. & B. 189.

(2) 13 L. T. 404.

(3) 33 J. P. 244.

traffic and business thereof, and passenger trains arrive and depart from the whole of such platforms. Paragraph 14 says the position of the covered station for passengers and goods, and coal depots of the appellants' railway in the said townships and assessed in the said general district rates are also delineated in the plan. Mr. Manisty admitted that the sidings, &c., may be taken as part of the railway (meaning thereby, in my opinion, the sidings, turntables, and platforms mentioned in paragraph 13, except the long slip of land which ran along the line and was in no sense part of the railway. (He was stopped.) The decision of Lush J. on this point is as follows: "As to the other point, we think the rate was bad in so far as it did not include the sidings, turntables and platforms as part of the railway, but as to the strip of land that is a question of degree as to which the arbitrator alone can decide. Therefore, . . . as to the second question, we remit the case with our opinion that the sidings, etc., and so much of the strip of land as is necessary to the use of the railway, should be included as part of the railway." The question as to the strip of land, as I understand the case, was merely a question of quantum, i.e., whether the railway company had appropriated to the sidings, turntables, and platform more land than was necessary, or than they were entitled to use for that purpose. I see nothing in this case which is manifestly inconsistent with the *South Wales Case* (1), which Mr. Maule, in his argument on behalf of the company, cited in support of his case.

The next case I will deal with is *London and North Western Railway v. Llandudno Improvement Commissioners*. (2) In that case the first seven items were held to be entitled to be rated at one fourth only, except No. 3 and No. 5, that is to say, roof, roof covering railway, roof covering platform, roof covering sidings, platform under roof and platform uncovered, were held entitled to the exemption, and the respondents admitted that (12.) signal boxes and appurtenances, (13.) engine turntables, and (14.) sidings and land, came within the same principle; but it is important to note the character of those things which were held liable to be rated at the full value. Those are (3.) roof covering cab drive, (5.) roof covering buildings, (8.) cab drive

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(2) [1897] 1 Q. B. 287.

C. A. under roof, (9.) cab drive and horse landing uncovered, (10.) cattle
 1913 landing and pens, (11.) crane in goods yard. Pollock B. rests
 LANCASHIRE his decision largely upon the finding of Lord Campbell that
 AND the platform and sidings placed upon the embankment of the
 YORKSHIRE railway were part of the railway, but omits to notice that Lord
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 LIVERPOOL Campbell goes on to say, "But I am of opinion that the rest of
 CORPORATION the property is liable to the full rate." Now the rest of the
 TION. property other than the platforms and sidings consisted, as I
 Vaughan have already stated, of stations, offices, engine sheds, warehouses,
 Williams L.J. tanks, waterworks, cranes and other fixed plant, machinery and
 works, necessary for the use of the working of the railway as
 such, and connected and used therewith. The learned Baron
 then refers to *Adamson v. Edinburgh and Glasgow Ry. Co.* (1)—of
 which case I will speak presently—and then proceeds to deal with
North Eastern Railway v. Scarborough Local Board (2), as to
 which case he says: "But there is another decision which,
 although it is very scantily reported, is one which I think we are
 bound loyally to obey, and one which is based to my mind on
 somewhat broader, and I cannot help thinking sounder, reasons than
 the case of the *South Wales Ry. Co. v. Swansea Local Board*." (3)
 Wills J., the other member of the Court, although upon p. 297 he
 criticizes what, to my mind, he erroneously thought to be the
 ground of the decision of that case, yet says, "This much is quite
 clear, that it is in accordance with the principle of the *South
 Wales Ry. Co. v. Swansea Local Board* (3), that whatever is
 absolutely necessary for the physical use of the railway is to be
 treated as railway;" and then says: "It seems to me that we
 should be acting consistently with the principle of the *Swansea
 Case* (3) by holding that these platforms are part of the land used
 for the purposes of a railway." I have made these observations
 because I think they shew that neither of the learned judges,
 although they criticized to a certain extent the *Swansea Case* (3),
 purported to overrule it, in fact they based their judgment on it,
 as they understood it, though, I think, wrongly understood it.
 Pollock B. next deals with *North Eastern Railway v. Scarborough
 Local Board* (2), decided by Lush, Hannen, and Hayes JJ.,

(1) 2 Macq. 331.

(2) 33 J. P. 244.

(3) 4 E. & B. 189.

and says "that they all, having the *Swansea Case* (1) before them, went further, and laid down the general doctrine that the word 'railway' was not confined to the rails themselves and the land beneath them, but was to be applied to a case where there were platforms, which it was not shewn were built absolutely upon land which was necessary for the support of the railway. They used broader words, words which to my mind are of more general use in construing Acts of Parliament of this kind than any language that is to be found in the judgments in the *Swansea Case* (1), for they say that so much of the strip of land as is necessary to the use of the railway should be included as a part of the railway." I will pause here for a moment to point out that the learned judges to my mind were not merely going further than the Court went in the *Swansea Case* (1), but were contradicting it, because the Court in that case distinctly refused to include in the favouring clause things that were stated in the case to be "necessary for the working and use of the railway as such and connected and used therewith." But Pollock B. himself places on the word "necessary" some very strict limitations, for he says, "That, of course, must be construed strictly. It must not be said that it is necessary to have a booking office, and this, that, and the other, for many reasons. I think that directly a thing becomes a building it comes under another distinct category and therefore is disposed of and dealt with in another way Of course, there must always be in all cases the question of degree, namely, how much is necessary for the use of the railway and how much is necessary merely for the convenience of passengers and others. If a railway company sought to take any more land than was directly necessary for the convenience and use of their line, then in that case as a matter of fact that portion which was not necessary ought to be excluded from the exemption given by such sections by any Court or arbitrator before whom the case came." The words of the learned Baron seem to me capable of two interpretations: if they mean that in a case in which in law the work is necessary to the physical working of the line, the quantum of land or structure is for the arbitrator as being a matter of fact, I have nothing to say against it; but if he

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C. A. means to include the question of whether in law the work or
 1913 structure in question is necessary for the physical user of the
 LANCASHIRE land in such a sense as to entitle the work or structure to the
 AND benefit of the favouring clause I do not agree with him, and I
 YORKSHIRE think that this is law and not fact. And, indeed, this question
 RAILWAY was so treated by Pollock B. himself when he decided that certain
 v. things were inside and outside the proviso.
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The case of *Adamson v. Edinburgh, &c., Railway* (1) is in my opinion not relevant to the case we have to deal with. It merely deals with the 45th section of the Scotch Poor Law Act. Under the Scotch Act a railway is rated as a whole by the real lineal mileage. It is, as pointed out by Mr. Page, a way by which the agricultural parishes of Scotland are benefited to some extent by the excessive traffic which goes through the great manufacturing towns of Scotland, quite different from that which applies in England. The head-note of that case is as follows: "Station houses and buildings ancillary thereto are, for the purposes of poor law assessment in Scotland, to be regarded as parts of the railway, and the value is to be apportioned among all the parishes on the line of railway." The case deals with valuation and not with exemption: and the whole railway in the wide sense of the word is the prime factor in the valuation. I cannot regard the case as really relevant to the case we have to decide, and, indeed, Mr. Balfour Browne takes the same view, for he says, "I am bound to say I do not place much reliance on the House of Lords case."

The judges in the *Llandudno Case* (2) do not in words overrule the *Swansea Case*. (3) They prefer, it is true, that which they call the "broader grounds" acted on in other cases; that is all.

As to *Williams v. London and North Western Railway* (4) I do not think that any of us regard that case as really relevant either to the appellants' or respondents' case. The ground upon which that case was decided was the peculiar facts of the case, which included the fact that the connection between the covered shed (which was used for loading and unloading railway trucks) and the main line of the railway company consisted of a dock

(1) 2 Macq. 331.

(2) [1897] 1 Q. B. 287.

(3) 4 E. & B. 189.

(4) [1900] 1 Q. B. 760.

line belonging to the Mersey Docks and Harbour Board, who, under statutory powers, permitted the company to use such line, and a tramway laid across a street under a licence granted by the corporation under statutory powers. I think, therefore, that the reference to that case in the judgment of Avory J., when he says that the present one is governed by it, is wrong.

I do not find that the *Swansea Case* (1) has ever been overruled. It is still true to say that to get the exemption of three fourths of the value the land must be used only as a railway, that the railway must have been made under the powers of an Act of Parliament for public conveyance, that the expression "land used as a railway" is not to be confined to so much of the railway only on which traffic is conveyed from point to point, but may include land in immediate proximity to the railway properly so called on which is apparatus or adjuncts connected with the railway proper, used and necessarily used for the purposes of the traffic on the railway as distinguished from the general purposes of the undertaking.

I have had the advantage of reading the judgment of Kennedy L.J.: his judgment seems to recognize the principles which I have already deduced as being the principles established by the *Swansea Case* (1), and he states those principles with such clearness and precision that I prefer simply to adopt his statement thereof; and only wish to add on my own part that I think throughout the argument of Mr. Balfour Browne and Mr. Page I find an argument which seems to ignore the distinction between what is necessary and what is convenient, and seems also to ignore the rule rendering "immediate proximity with the railway properly so called on which is apparatus physically connected with the railway used and necessarily used for the purpose of the traffic on the railway as distinguished from the general purpose of the company" a condition of the exemption.

Except, therefore, No. 6 of schedule B, which corresponds to No. 7 of schedule A, and No. 8 in schedule A (omitting, however, the cranes) and No. 7 in schedule B, I think that the decision of the Divisional Court should be affirmed. These items appear to

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C. A. me to fall within the principle which I have stated, and there-
1913 fore, as to those, the appeal succeeds.

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KENNEDY L.J. In this case the Court of Appeal has to consider a question which has arisen in regard to the rating of the North Docks Goods Station and the Great Howard Street Goods Station of the Lancashire and Yorkshire Railway Company at Liverpool. The learned recorder of Liverpool, holding the county quarter sessions at Liverpool, decided in favour of the railway company, and has set forth the facts and the reasons for his decision in a special case. The Divisional Court, consisting of the Lord Chief Justice (Lord Alverstone), Pickford and Avory JJ., from whose judgment this appeal is brought, have reversed that decision.

The appellants' contention is that all the items numbered 1 to 9 in paragraph 13, schedule A, of the special case, in reference to the North Docks Goods Station, and all the items numbered 1 to 8 in paragraph 26, schedule B, in reference to the Great Howard Street Station, are to be re-rated at one fourth only of their rateable value under s. 36, proviso (ii.), of the Liverpool Corporation Act, 1893. The respondents' contention, on the other hand, is that, with the exception of No. 7 of paragraph 13, schedule A, in reference to the North Docks Station (which they have allowed, as they say, as a matter of grace and not as a matter of legal right), none of the items in either schedule can be brought within the terms of the statutory provision to which I have referred. The Divisional Court, as I have already said, had reversed the decision of the Liverpool quarter sessions, which was in favour of the present appellants and which allowed the exemption claimed by them.

The question turns upon the applicability, in regard to the items in dispute, of the expression in s. 36, proviso (ii.), "land used only . . . as a railway made under the powers of any Act of Parliament for public conveyance." The Divisional Court—so far in favour of the present appellants and affirming the finding of the quarter sessions—has held that the whole of the works in schedules A and B were made under the powers of the appellants' private Acts and the Railway Consolidation Acts. Before us the learned counsel for the present respondents have

impugned the correctness of the judgment of the Divisional Court upon this point, but, in my opinion, without success. Whilst, however, so far approving the case put forward for the present appellants the Divisional Court has decided against them, because it has held that the further vital question, whether the particular items or any of them (item 7 of schedule A excepted) come within the description of "land used only as a railway" within the meaning of the statute, must be answered in the negative. The question, therefore, which we have to consider is, what is "land used only as a railway"? There is no doubt, I think, that this is a question which presents considerable difficulty. So far as judicial authority is concerned there are, as it appears to me, only five reported cases which really are relevant and helpful. In each of these five cases the questions which we have to consider arose under statutory provisions which are practically identical with those in the present case. The earliest of them is *South Wales Ry. Co. v. Swansea Local Board*. (1) That was decided by Lord Campbell C.J., Wightman and Erle JJ., in the year 1854. It was held that "railway" means the way in which carriages actually go, including the line itself and the turntables and the sidings upon it, and the land used only for actually supporting this way, as for example for embankments, is within the proviso, but that adjuncts such as stations and warehouses, though necessary for working the railway, are not part of it within the meaning of the proviso. The only further point to be noted is that Lord Campbell and Erle J., on the materials before them, were prepared to treat as part of the railway so much of the platform as is of the same width as the side of the railway adjacent to the line itself. The next two cases, namely, *Newport Docks Co. v. Newport Local Board* (2), decided in 1862 by a Court consisting of Cockburn C.J., Crompton and Blackburn JJ., and *Midland Ry. Co. v. Birmingham Borough Council* (3), decided in 1866 by Mellor, Shee, and Lush JJ., in no way weaken the authority of the *Swansea Case* (4), and

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indeed in the course of the judgments in both cases the *Swansea Case* (1) is cited with approval. The next case in order of date is that of *North Eastern Ry. Co. v. Local Board of Scarborough* (2), argued in 1869 before Lush, Hannen, and Hayes JJ. In the judgment of Lush J., in which Hannen J. and Hayes J. concurred, the decision of the Queen's Bench in the *Swansea Case* (1), which had been cited by counsel in argument, if the report is correct, was not mentioned. It is the fact that in this case not only turntables and sidings but also platforms were held to be covered by the exemption as part of the railway, and that as to an adjacent strip of land the Court held that "so much of the strip of land as is necessary to the use of the railway should also be included as part of the railway," and the Court remitted this, as a question of fact, to the arbitrator for his consideration. To this extent, as the counsel for the appellants contended on the argument before us in the present case, the judgment may perhaps be regarded as taking a rather larger view of the meaning of "railway" than was taken in the *Swansea Case* (1), and this was the opinion of the learned judges in the case to which I am going immediately to refer. I use the word "perhaps" because it is difficult, merely from reading the report, to feel sure as to the position of the platforms on the adjacent strip of land which was in question in that particular case. The fifth and latest of the relevant decisions is that of Pollock B. and Wills J., sitting as a Divisional Court, in the case of *London and North Western Ry. Co. v. Llandudno Improvement Commissioners*. (3) The learned judges, whilst excluding from the exemption cattle landing and pens and the cranes in the goods yards, allowed the exemption in respect of roof covering railway, roof covering platform, roof covering sidings, platform under roof, and platform uncovered. Wills J., in regard to the admission of platforms, stated—at p. 298—that he thought that in allowing the exemption in respect of platforms the Court was not deciding inconsistently with the principle of the *Swansea Case* (1), but both he and Pollock B. expressed some dissatisfaction with that case, and relied upon what they considered the

(1) 4 E. & B. 189.

(2) 33 J. P. 244.

(3) [1897] 1 Q. B. 287.

broader view taken by the Court in the case of *North Eastern Ry. Co. v. Scarborough Local Board* (1), to which I have already referred. Pollock B. further relied upon the reasoning of the decision of Lord Cranworth and Lord Brougham in the Scotch case of *Adamson v. Edinburgh and Glasgow Ry. Co.* (2), a case which, dealing as it does with a different subject-matter, arising under Scotch rating law, in regard to apportionment of value among all the parishes on the line of the railway, does not appear to me to be really in point upon the question which we have to consider. It appears to me, as it did to the Divisional Court in the present case, that the decision in the *Llandudno Case* (3) carried the exemption beyond the true principle laid down in the earlier cases. It is noteworthy, I think, that the Recorder of Liverpool, in giving this judgment of the quarter sessions in the present case, finds fault (special case, p. 34) with the judgment in the *Llandudno Case* (3), because it did not allow the exemption to extend to cattle landings, pens, and goods cranes, affording thereby, as I think, an illustration of the difficulties which must arise if you once deviate from the principle enunciated and applied by the Court of Queen's Bench in the *Swansea Case*. (4) What was that principle? As I understand the judgment, it is this. From the consideration of the other classes of property to which, by the same proviso, alike in the Public Health Acts and in private Acts the Legislature has granted one-fourth scale of rating—"arable, meadow or pasture ground, orchards or allotments, woodland, market garden, nursery grounds or any land covered with water and used only as a dock or a canal or the towing path thereof"—the first inference is that the Legislature has intended to grant the partial exemption only in respect of certain areas of occupied land, the distinguishing characteristic of all of which is, I think, that they are not utilized for buildings, the occupation of which can be fairly deemed to be bettered by the expenditure of the moneys provided by the rate. The judgment of the Queen's Bench Division in *Purser v. Worthing Local Board* (5) in no

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(1) 33 J. P. 244.

(3) [1897] 1 Q. B. 287.

(2) 2 Macq. 331.

(4) 4 E. & B. 189.

(5) 18 Q. B. D. 818.

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wise conflicts with this. A market garden is expressly mentioned in the statute as a subject of exemption; and glasshouses are an ordinary part of the machinery of cultivation of such a garden. This being the context, it is reasonable to give to the word "railway" in the expression "land used only as a railway" a sense so far restricted as not to include the railway system or the railway works generally, but only, with the rails themselves, the land upon which they rest or which is necessary for their support, and such physical adjuncts upon that land, for example, signal-boxes, turntables, and sidings, as though not actually part of the rails, are necessary for the mechanical work of using the railway, that is to say, moving carriages or wagons along the "way" or transferring them from one line to another. It appears to me that, if this interpretation is placed upon the statute, you get a fairly plain and intelligible test in accordance with the true reason for the exemption as appearing in the context. Directly you go beyond this and admit to the one-fourth scale of rating buildings and structures not necessary for the physical use of the rails but erected in connection with their use for the more convenient or more profitable working by the railway company of its business as a carrier of passengers, cattle, and goods (and this is the standard which appears from paragraphs 17 and 30 of the special case to have been adopted by the quarter sessions), you deviate, as it seems to me, and as the Divisional Court has held, from the line prescribed by the principle of the legislation which has decreed the exemption for "land used only as a railway." I see no sound basis for discrimination between one kind of building or structure which is useful and which is used for the business of the railway company as carriers and another. There may often be cases on the border line; but, so far as regards the present case, platforms erected in these railway stations for the more commodious handling of traffic and the collecting together of goods or passengers and placing them comfortably on board a train, cattle landings or mounds for loading or unloading cattle, and roofings built over platforms in order to shelter passengers or goods from wet or inclement weather—and for all these the partial exemption is claimed in the present case—appear to me

to be in principle as little within the statutory partial exemption as the warehouses and other adjuncts to the dock itself (for example, the area covered by water) were held to be in *Newport Dock Co. v. Newport Local Board*. (1) This is the view of the law which, as I read it, was adopted by the Court of Queen's Bench in the *Swansea Case* (2) and approved in the next two succeeding cases I have cited. It is quite true that in the *Swansea Case* (2) the Court were willing to extend the partial exemption to a portion of the platform, but the learned judges in so deciding expressly limited such exemption to so much only of the platform as rested upon the land supporting the railway. It may be, as the learned judges in the later *Llandudno Case* (3) appear to have thought, that the reason assigned by the Court of Queen's Bench for including such portion of the platform is open to criticism. But the reason being what it was, this part of the decision gives no colour to the view that all platforms, as such, and because they are convenient for the conveyance of the railway company's business, are to be treated as proper subjects of the exemption. I agree with the judgment of the Divisional Court in the present case that in so far as the judgment in the *Llandudno Case* (3) did so treat not only platforms, but railway roofs, and roofs covering sidings, it ought not to be followed.

Applying that which, as I have stated, I understand to be the principle of decision in the *Swansea Case* (2), I am of opinion that in regard to all the items set out in schedules A and B of the special case, except No. 7, which the respondents have admitted, and No. 8 in schedule A, and Nos. 6 and 7 in schedule B, the appellants' case fails.

I will now deal with these three items: No. 8 in schedule A and Nos. 6 and 7 in schedule B. I will take first No. 6 in schedule B, "sidings and turntables and the land thereunder." As I have already said, the respondents have admitted precisely the same item, No. 7, in schedule A, and in principle, as I have also said, "sidings and turntables and the land thereunder" appear to me to form part of the "railway" according to the true interpretation of the statutory enactment which grants the partial

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(1) 2 B. & S. 708.

(2) 4 E. & B. 189.

(3) [1897] 1 Q. B. 287.

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in claiming the right to treat No. 6 in schedule B relating to the North Docks Goods Station differently from the precisely similar item, No. 7 in schedule A, relating to the Great Howard Street Goods Station. The disallowance of this No. 6 in schedule B is apparently justified in the judgment of the Divisional Court upon the authority of *Williams v. London and North Western Ry. Co.*(1) I venture to think that that case was, in its facts, peculiar and distinguishable from the present. The premises there under the consideration of the Court of Appeal were the Brunswick Dock Station at Liverpool. It was held by the Court of Appeal that no part of the land used for the lines, sidings, and platforms within the premises was land "used as a railway made under the powers of an Act of Parliament for public conveyance." The facts were that the premises in question, which had in them a goods depot for receiving and delivering goods and eight lines of rails of railway, each forty yards in length, with turntables, &c., were by a licence, terminable at a month's notice, granted by the Liverpool Corporation, connected with the railway company's main line at Wapping Goods Station by a tramway laid in a street. In fact, therefore, the lines inside the Brunswick Dock Station were, as the Court (A. L. Smith, Collins, and Romer L.JJ.) held, not a railway at all within the meaning of the Railway Acts. A. L. Smith L.J. so states (p. 767): "Now suppose these tramways across the road were not there—could any one call the lines inside the four walls a railway? Then these tramlines outside are not a railway, for it has been held that a tramway is not a railway. The licence which may be terminated at a month's notice cannot make that a railway which would otherwise not be one, so that the blot on the case for the company is that they have not got any line of railway at this place but only some rails inside the building." A further ground is also stated by the Lord Justice, although he preferred to rest his judgment upon the first which I have quoted, and that was that the putting up of this island depot with its lines inside it would not be treated as an exercise of a power to make a railway

(1) [1900] 1 Q. B. 760.

for public conveyance. Collins L.J. was of the same opinion. It is, I think, needless to quote from his judgment more than the concluding sentence. "As a matter of common sense, looking to the ordinary meaning of 'railway' I should say this arrangement of lines and sidings is not a railway, and, looking at it in point of law, I find nothing to shew that this is a railway made under the powers of an Act of Parliament for public conveyance." Romer L.J. concurred in the judgment, but with an expression of great doubt.

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The case of this Great Howard Street Goods Station is entirely different. It is expressly found, as appears in the judgment of the Divisional Court, that the whole of the works in schedule B were made under the powers of the appellants' private Acts and the Railway Consolidation Acts and that the railway was for public conveyance. As appears in the description given in section 29 (iv.) of the special case it is physically connected with the main line of railway so far as the transit of goods is concerned by lines of rails on an incline. It is none the less so connected because it is also connected by eight wagon hoists, provided with fixed rails, which are used for taking up wagons, loaded or empty, to the main line, whilst the lines of rail on the incline are used for the descent of loaded or empty wagons, but not for locomotive wagons.

For these reasons it appears to me that the case of *Williams v. London and North Western Ry. Co.* (1) has no application to the present case; and, this being so, that there is nothing to differentiate item No. 6 of schedule B, relating to the turntables and sidings and the land thereunder in Great Howard Street Goods Station, from item No. 7 in schedule A, relating to the same description of property in the North Docks Goods Station, which the respondents allowed to be rateable on the one-fourth scale. In my judgment, therefore, on this point, the judgment of the Divisional Court ought to be reversed, and the appellants ought to be held entitled to one-fourth scale of rating in respect of the sixth item, "sidings and turntables and land thereunder," in schedule B.

There remain to be considered items No. 8 in schedule A and

(1) [1900] 1 Q. B. 760.

C. A. No. 7 in schedule B. They are, so far as the question of character
 1913 is concerned, almost identical. The first is "hoist houses and
 LANCASHIRE land thereunder, hoists, capstans, machinery and cranes." The
 AND second is "hoist houses and lands thereunder, hoists, capstans,
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 LIVERPOOL I have come, but not without considerable hesitation, to the
 CORPORATION. opinion that both these items (except the cranes in No. 8 of the
 Kennedy L.J. schedule, which are stated to be used for handling goods) ought
 to be treated as sidings and turntables are treated, and that the
 appellants ought therefore (subject to the one significant excep-
 tion of the cranes) to be rated on the one-fourth scale in respect
 of them. As I understand the descriptions in the special case
 (paragraphs 16 and 29) both these items consist, the cranes
 excepted, of machinery and gear upon the railway which are used
 for the movement and haulage of wagons along the rails or for
 the transfer of hoists of wagons between rails on different levels,
 such wagons whilst in course of transit being on rails which are
 fixed on the floors of the hoists. If this is correct I am, upon the
 whole, of opinion that these items should be allowed as part of
 the railway within the meaning of the exempting clause of the
 statute.

The result is that the appellants are, in my judgment, entitled
 to succeed in respect of items 7 and 8 of schedule A, and items 6
 and 7 of schedule B, and no more.

Joyce J. The Liverpool Corporation Act, speaking generally,
 provides for the levying of a general rate upon all property for
 the time being assessed for the relief of the poor and so on, with
 a proviso or saving clause applying *inter alia* to land used, or
 used only as a railway made under the powers of any Act of
 Parliament for public conveyance.

What we have to determine on this appeal is whether the
 items numbered 1 to 9 in schedule A, on p. 6 of the special case,
 with the exception of No. 7 in that schedule (this was admitted
 by the corporation to be entitled to the exemption claimed), and
 items 1 to 8 in schedule B, p. 13, of the special case, are or are
 not entitled to the partial exemption conferred by the proviso.

Now some things may be taken to be settled, as Lord Lindley

often used to say, whether we like it or not, and one is that the term "railway" in this proviso does not extend to and comprise everything that is used or reasonably necessary for carrying on the traffic or undertaking of a railway company. Adjuncts of the railway that are merely conveniences, such as station buildings, warehouses, &c., are not entitled to the benefit of the proviso.

Again, I think it is settled that in this proviso the term "land used as a railway" is not limited to the ground occupied by the actual rails or lying between the rails. It may be difficult to draw a definite and precise line between what is and what is not "land used as a railway." But at the same time it may be tolerably easy to determine of various things specified—of which instances may be given—which are and which are not parts of the railway, and that the ground occupied by them accordingly is or is not land used as a railway. It is plain, I think, that the term railway in its narrowest sense must include not merely the iron rails and the sleepers upon which they rest, but also the road bed made up of ballast to hold the sleepers in their proper position—the ground between the rails where there is but a single line, and the "six foot"—I believe it is called—between the tracks where there are two or more lines of rails. The expression used in the proviso is not land used for a line or lines of rails, but land used as a railway (a far more comprehensive term in my opinion) made in pursuance of any Act of Parliament for public conveyance. Nor is there anything in the proviso about main or trunk lines or lines running from one terminal station to another. Supposing there were a railway which—if such a thing be possible—ran from nowhere to nowhere, with no station at either end or indeed anywhere else upon it, still if it were made under the powers of any Act of Parliament for public conveyance the ground which it occupied would be land used as a railway within the proviso.

It may also I think be taken as well settled that when a railway line is upon an embankment, the sides or rather the whole of such embankment, or where the line is in a cutting the slopes by the side, are part of the railway, and also—for this in my opinion follows—the strip of ground necessary to be left between

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the outer rails and the foot of the slopes. And where the railway is neither upon an embankment nor in a cutting the strip often occupied by telegraph posts, &c., that is necessary to be left between the actual lines and the fences on either side which every railway company is bound by statute to maintain, must in my opinion be part of the railway and so land used as a railway within the proviso. Further, railway lines do not cease to be part of a railway within the proviso because they may be covered by a roof or entirely enclosed upon either side by buildings belonging to the company that owns the railway, or because they may run into or through or lie within what is called a station whether for passengers or for goods.

Now what is a railway siding? It has been described as a "short track by the side of a railway and opening into it at one end or possibly both ends." It may be used for various purposes, for instance, shunting engines or carriages or trucks off the principal line out of the way in order to free the principal line for passing traffic—or for the marshalling or forming up of trains—or for loading passengers or goods either within a station or otherwise without delaying traffic on the principal line. How it can seriously be maintained that an ordinary railway siding with rails upon it is neither a railway nor part of a railway surpasses my comprehension. And the ground underneath and supporting anything that is part of a railway must be land used as a railway.

What is a turntable? Broadly speaking it is a circular revolving platform for reversing locomotives, railway carriages, wagons or trucks, or shifting them from one line of rails to another. A railway turntable is traversed—and actually occupied by—a line or lines of rails. Why is it not part of the railway or railways on or in connection with which it is used? It is in truth part of the railway line or railway lines though movable upon a pivot. So far as I am aware, before the decision of the Court now under review no Court or judge has ever held that ordinary railway sidings or turntables are not part of the railway in connection with which they are used, and therefore not entitled to the benefit of the proviso. Indeed I doubt whether this has ever been seriously contended before the present case.

The judgment of the Divisional Court contains the following passages:—"The exemption" (that is, the partial exemption conferred by the proviso) "in terms applies to 'any land used as a railway,' or it may be read 'used only as a railway made under the powers of any Act of Parliament for public conveyance.' It was contended before us and at quarter sessions that the appellants had not shewn that the works described in schedules A and B were part of a railway made under the powers of any Act of Parliament for public conveyance. We think it was established that the whole of the works in schedules A and B were made under the powers of the appellants' private Acts and the Railways Clauses Consolidation Acts and that the railway was for public conveyance." With that I entirely agree, and my judgment proceeds upon the hypothesis that it is correct. It follows therefore—if I am right in the views I have expressed—that the decision of the Divisional Court with respect to item No. 6 in schedule B—sidings and turntables—is erroneous. Indeed I think it is impossible to support it either upon principle or authority. Item No. 7 in schedule A was conceded as I have already mentioned.

Returning to the schedules A and B on pp. 6 and 13 of the special case: It will perhaps be convenient to take first No. 8 in A and 7 in B, videlicet: hoist houses and land thereunder, hoist, capstans, and their machinery and cranes. If I rightly understand the facts, these are not merely conveniences, but necessary for the working of the railway lines as constructed; in other words for their physical user by trucks or locomotives. We were told, and it was not contradicted by any one, that the hoist and capstans—that is the hauling power—and the hoist houses were all either actually over the line or by the side of it, and that the wagons or trucks thereby moved or operated upon were always upon the metals. They appear to me to be some of the very things by which the lines are actually worked and just as much part of the railway as signal posts or signal boxes or the apparatus or appliances by which the points are moved or operated—I mean the levers and chains that move the points. My conclusion therefore is that these are actually part of the railway in the very narrowest sense that can be put upon

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C. A. that term. Consequently the ground upon which they stand is
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I now come to the cattle loading platforms or mounds, the loading platforms or mounds, the loading ways or roads, with the land thereunder, Nos. 4, 5, and 6 in A and 4 and 5 in B. These several items, as I understand, are used for the same purposes and are just as necessary in connection with the loading or unloading of cattle or goods as passengers' platforms by the side of the line for the use of human beings in getting into or out of passenger carriages. No passenger platform is directly in question in the present case, but without doubt commodious and sufficient passenger platforms according to English ideas are absolutely necessary—for the user of the railway lines by passengers—their minimum width is prescribed by the Board of Trade—and their absence would seriously endanger the safety—even the lives—of the public who make use of the railway. I do not hesitate to say that such necessary platforms are part of the railway and the ground thereunder is used as a railway and within the proviso if the railway was made in pursuance of any Act of Parliament for public conveyance. And it follows, I think, that similar—I do not say “conveniences”—but appliances and arrangements for cattle and other goods being as they are a practical necessity, if the lines are to be used for such traffic, are part of the railway if not part of the actual lines. If I rightly understand the facts with respect to the “cattle loading platforms or mounds and the loading ways and roads,” they also, in my opinion, are entitled to the benefit of the proviso.

The items Nos. 1, 2, and 3 in schedule A and also in schedule B are roofs over “lines described as being directly productive,” whatever that may mean, or else over the loading platforms or mounds, loading ways or roads with which I have dealt already. I do not pretend to be conversant with rating law, but how these mere roofs over what are held—if rightly held—to be parts of the railway and so to be entitled to the benefit of the proviso can be rateable if at all upon a different scale to the ground underneath or whatever they may cover being parts of the railway is not apparent to me, and no one has attempted to explain it to us.

I think these roofs ought not to be held to be outside the proviso and I am not aware of any authority for so treating them.

The only other items that remain to be dealt with are whatever may have been intended to be comprised under the designation of approach roads to loading ways or roads and the lands thereunder. I refer to items Nos. 9 in A and 8 in B. I certainly should find a difficulty in holding an ordinary road on the natural surface of the ground though leading up to a railway platform to be part of the railway. I confess that I cannot, from the special case, make out the precise facts as to these items. It is possible that they or parts of them may be just as necessary in connection with the goods traffic (and as much parts of the railway) as the passenger or cattle loading platforms, but I have not been able to satisfy myself upon the materials before us that this is so.

I have read one passage from the judgment of the Divisional Court. Further on this judgment mentions the *Swansea Case* (1), the *Birmingham Case* (2), and referring to the *Llandudno Case* (3) states that in the opinion of the Divisional Court this carried the exemption beyond the true principle. With all respect I do not think so. Speaking for myself, I see nothing to quarrel with in the decision of the Court in the *Llandudno Case* (3) in so far as it allowed the exemption.

Then lower down the judgment proceeds: "Further, with respect to the items Nos. 1 to 8 in schedule B, including No. 6, 'sidings and turntables and the land thereunder,' described as parts of Great Howard Street Goods Station, having regard to the facts stated in paragraph 29 of the special case, we think they are governed by the decision of the Court of Appeal in *Williams v. London and North Western Ry. Co.* (4), that they are not part of the railway in the ordinary sense and these sidings and turntables cannot be considered as part of the running line.

In the case of *Williams v. London and North Western Ry. Co.* (4) the circumstances were peculiar, and it was held (dubitante Romer L.J.) that the entirely detached portions of the lines of rails there in question were not railways or (I suppose) any part of the railway made under the powers of any

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(1) 4 E. & B. 189.

(2) 13 L. T. 404.

(3) [1897] 1 Q. B. 287.

(4) [1900] 1 Q. B. 760.

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1913 the decision, and depending as it does upon the special circum-
stances it has little, and in my opinion nothing whatever, to do
with the present case if the hypothesis upon which, as I have
stated, my judgment proceeds be correct.

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It follows therefore that I am unable to agree with the reasoning of the judgment of the Divisional Court. Perhaps I should say that I do feel some difficulty about the *Swansea Case* as reported in 4 Ellis and Blackburn. If that is to be taken as a definite decision that wherever a platform is situate above the side of a railway embankment, just so much of it as is vertically over the side of the embankment and no more is part of the railway or is land used as a railway, then I cannot agree with it, being, as I think it would be, inconsistent with later decisions of equal authority. But we have not the exact materials that were before the Court in that case, and it is important to note the concluding sentence in Erle J.'s judgment referring to those materials. Upon the whole therefore, subject to any question about the approach roads in No. 9 in schedule A, and No. 8 in schedule B, I think that this appeal ought to be allowed.

Appeal allowed as to specified items.

Solicitors for appellants : *Woodcock, Ryland & Parker, for A. de C. Parmiter, Manchester.*

Solicitors for respondents : *F. Venn & Co., for E. R. Pickmere, Liverpool.*

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[IN THE COURT OF APPEAL.]

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May 1.

Insurance (Health)—Sickness Benefit—Rule of Approved Society that only a Certificate of a Panel Doctor will be accepted—Ultra vires — Dispute between Member of Approved Society and Society — National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 14, 67.

A rule of an approved society under the National Insurance Act, 1911, provided that "an insured member shall send notice of illness to the secretary, in the form required by the court, as soon as possible after the commencement of the illness, whether he is entitled to claim benefit in respect of the illness or not, and shall not be entitled to sickness benefit until he has sent to the secretary a declaration of incapacity for work in the form required, and a medical certificate or other sufficient evidence of incapacity and the cause thereof." Subsequently the society passed a resolution that "in every instance a certificate from a panel doctor must be sent."

The plaintiff, a member of the society, was refused sickness benefit on the ground that he had sent in a certificate from the doctor who had in fact attended him in his illness, who was not a panel doctor, and had not sent in a certificate from a panel doctor. The plaintiff thereupon sued the society, claiming a declaration that the resolution was illegal and *ultra vires* :—

Held, reversing a decision of Bailhache J., that the resolution was illegal and *ultra vires*, and that, as the matter was not one of domestic administration which under s. 67 of the National Insurance Act, 1911, ought to go to arbitration, the plaintiff was entitled to the declaration sought.

APPEAL of the plaintiffs from a decision of Bailhache J., sitting without a jury. The plaintiff Heard, on behalf of himself and all other members of the Court Abbey Foresters, No. 1940 of the Ancient Order of Foresters Friendly Society, sued the defendants, who were the trustees and secretary of the society, for a declaration that a certain resolution, passed on January 15, 1913, was illegal, *ultra vires*, and unenforceable.

By the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 14, sub-s. 1, "Sickness benefit, disablement benefit, and maternity benefit shall be administered, in the case of insured persons who are members of an approved society, by and through the society, or a branch thereof, and in other cases by and

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through the insurance committees; medical and sanatorium benefits shall in all cases be administered by and through the insurance committees” By s. 14, sub-s. 2, “Subject to the provisions of this part of this Act, an approved society may, with the consent of the Insurance Commissioners, provide for the application of its existing rules or make new rules with regard to the manner and time of paying or distributing, and mode of calculating, benefits, suspension of benefits, notices and proof of disease or disablement, behaviour during disease or disablement, and the visiting of sick or disabled persons, and for the infliction and enforcement of penalties (whether by way of fines or suspension of benefits or otherwise) in the case of any member being an insured person who is guilty of any breach of any such rule, or of any imposition or attempted imposition in respect of any benefit under this part of this Act, and may, from time to time with the like consent, alter or repeal any such rules.”

By s. 67 of the National Insurance Act, 1911, “(1.) Subject to the provisions of the foregoing section every dispute between (a) An approved society or a branch thereof and an insured person who is a member of such society or branch or any person claiming through him relating to anything done or omitted by such person, society, or branch (as the case may be) under this part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners.”

By rule 12, sub-rule 5, of the rules of the Ancient Order of Foresters Friendly Society relating to the business of the Order under the National Insurance Act, 1911, “An insured member shall send notice of illness to the secretary of the court, in the form required by the court, as soon as possible after the commencement of the illness, whether he is entitled to claim benefit in respect of the illness or not, and shall not be entitled to sickness benefit until he has sent to the secretary a declaration of incapacity for work in the form required, and a medical certificate or other sufficient evidence of incapacity and the cause thereof.”

On January 15, 1913, the society passed a resolution that "in every instance a certificate from a panel doctor must be sent."

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The plaintiff, having fallen sick, forwarded to the secretary of the society a medical certificate signed by the doctor who actually attended him, and who was not a panel doctor. The secretary, relying upon the resolution of the society, declined to recognize the medical certificate sent in, and insisted upon a medical certificate signed by a panel doctor being sent in before paying the plaintiff his allowances in respect of sickness benefit.

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On February 15, 1913, the secretary of the society wrote the following letter:—"Dear Dr. Elliott,—I am sorry that there is a difference between yourself and the court as regards the acceptance of your certificates for State members, but, as I have previously informed you, the members have passed a resolution that compels every State member to send a certificate from a panel doctor before the claim can be recognised, and I am simply carrying out the instruction. I have informed Brother Heard by post and personally of this instruction which probably you are not aware of, so have not sent telegram as you request."

The plaintiff thereupon brought the present action asking for a declaration that the resolution of the society was illegal and ultra vires.

Bailhache J. held that the dispute was a matter relating to domestic administration which, under s. 67 of the National Insurance Act, 1911, ought to go to arbitration, and accordingly gave judgment for the defendants dismissing the action.

The plaintiff appealed.

Patrick Hastings (*Comyns Carr* with him), for the plaintiff. The question is whether the defendants have a right to say that the plaintiff shall not be entitled to sickness benefit unless he is certified by a "panel" doctor. The effect of the society's resolution is illegal; it imposed on the insured person an obligation which is not an obligation allowed by the Act. It was therefore ultra vires.

Secondly, the defendants are wrong in their contention that under s. 67 of the National Insurance Act, 1911, the jurisdiction of the Courts was ousted. Sect. 67 is practically taken verbatim

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from s. 68 of the Friendly Societies Act, 1896, under which section there are many decisions which shew that where the matter is not an internal dispute it does not come within the section. In *McGlade v. Royal London Mutual Insurance Society* (1), where the question was whether a friendly society was entitled to turn itself into a company, it was not suggested that it was a matter which ought to have gone to arbitration. *Andrews v. Mitchell* (2) shews that, if what has been done is so illegal as to be beyond the jurisdiction, it is not a dispute within the section. [He also cited *Blyth v. Birtley* (3); *Dominion Cotton Mills v. Amyot* (4); *Foss v. Harbottle*. (5)]

Harry Dobb and *Alex. Neilson*, for the defendants. The decision of Bailhache J. on the preliminary point was right. It is fair to the defendants to say that the resolution was passed by the society in consequence of the receipt of a warning from the Insurance Commissioners that if they made payments which they ought not to make they might be surcharged. The resolution passed was a resolution by way of instruction to their officers; it was not a rule nor a judicial determination. Any dispute of any kind between a member and his branch is within s. 67. *Catt v. Wood* (6) is important as shewing the reluctance of the Court to interfere with the affairs of friendly societies. Almost the exact point raised here was raised in *Cox v. Hutchinson* (7), a decision of Warrington J. in favour of the exclusion of the jurisdiction of the Court. The general rule is that a dispute between a member and a society, including a dispute whether an act is ultra vires, must go to arbitration. There has always been included in the Friendly Societies Acts a section restricting the remedy in cases of disputes between a member and his branch to arbitration; and a section to the same effect finds its place in the National Insurance Act, 1911. Unless the circumstances are very special, the intention of the Legislature should be carried out. By s. 14, sub-s. 2, of the National Insurance Act, 1911, an approved society may with the approval of

(1) [1910] 2 Ch. 169.

(2) [1905] A. C. 78.

(3) [1910] 1 Ch. 228.

(4) [1912] A. C. 546, at p. 552.

(5) (1843) 2 Hare, 461.

(6) [1910] A. C. 404.

(7) [1910] 1 Ch. 513.

the Insurance Commissioners make new rules as to the mode of proving disease. It is not suggested that this was a rule; it was a resolution, in consequence of which the secretary said he would not pay sickness benefit. It was not ultra vires. The resolution might have met with the assent of the Insurance Commissioners, in which case it would have been a rule; but it never got beyond the stage of being a resolution. If the resolution were capable of being put in order and made an amended rule, it was nothing more than the omission of a formality. [They also cited *Stone v. Liverpool Marine Society*. (1)]

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Patrick Hastings in reply. This was a regulation which no formality could have rendered valid. This general regulation should have been submitted to the Insurance Commissioners in order to become a rule. But they could not have given their approval to it, because it was contrary to the Act. As to the distinction between a resolution and a rule, a matter affecting a particular member may be decided by resolution, but a rule is necessary in the case of a general proposition. The society have purported to lay down a universal binding rule in advance without obtaining the approval of the Insurance Commissioners.

VAUGHAN WILLIAMS L.J. This case has taken some time to argue, I do not say too long a time, because it is a matter of some public importance, raising questions which rendered it necessary to go into the authorities; but I am sorry that the case has had to be disposed of in a Court of law at all. I should have thought, if this society really wished to make the benefits of the Act easily accessible, no such resolution would have been passed as has been passed in the present case; and no such letter would have been written as was written by the secretary in the present case. I think the first letter which I need read is the letter of February 15, 1913, which runs thus. Mr. Frew writes: "Dear Dr. Elliott,—I am sorry that there is a difference between yourself and the court as regards the acceptance of your certificates for State members, but, as I have previously informed you, the members have passed a resolution that compels every State member to send a certificate from a panel doctor before the

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claim can be recognised, and I am simply carrying out the instruction. I have informed Brother Heard by post and personally of this instruction which probably you are not aware of, so have not sent telegram as you request." In my judgment that letter of the secretary puts it forward as a rule of the society. Although he uses the word "resolution," he clearly does not mean that which is described as a special resolution requiring certain majorities; but he says it is something which compels every State member to send a certificate from the panel doctor before the claim can be recognized; and that he sends that letter in accordance with his instructions. I have no doubt that in the majority of cases those who will take the benefit of the Act will, having regard to the number of medical men there are on the panels, send a certificate of a panel doctor. The words used in the statute, the National Insurance Act, 1911, c. 55, are these: "Administration of Benefits" is the heading. It is s. 14, sub-s. 1: "Sickness benefit, disablement benefit, and maternity benefit shall be administered, in the case of insured persons who are members of an approved society, by and through the society, or a branch thereof, and in other cases by and through the insurance committees; medical and sanatorium benefits shall in all cases be administered by and through the insurance committees." The rest of it it is not material to read and does not affect this question. Sub-s. 2 is: "Subject to the provisions of this part of this Act, an approved society may, with the consent of the Insurance Commissioners, provide for the application of its existing rules or make new rules with regard to the manner and time of paying or distributing, and mode of calculating, benefits, suspension of benefits, notices and proof of disease or disablement, behaviour during disease or disablement, and the visiting of sick or disabled persons, and for the infliction and enforcement of penalties (whether by way of fines or suspension of benefits or otherwise) in the case of any member being an insured person who is guilty of any breach of any such rule, or of any imposition or attempted imposition in respect of any benefit under this part of this Act, and may, from time to time with the like consent, alter or repeal any such rules." That only provides for the making of new rules; and

I do not see myself that there is any reason why we should not regard this thing which is called a resolution as being a new rule under that. If one looks at part 2 of the General Laws of the Ancient Order of Foresters Friendly Society, one finds this: "Registered under the Friendly Societies Act. Rules relating to the business of the Order under the National Insurance Act, 1911." These rules have to be approved by the Commissioners. It says by No. 5: "An insured member shall send notice of illness to the secretary of the court, in the form required by the court, as soon as possible after the commencement of the illness, whether he is entitled to claim benefit in respect of the illness or not, and shall not be entitled to sickness benefit until he has sent to the secretary a declaration of incapacity for work in the form required, and a medical certificate or other sufficient evidence of incapacity and the cause thereof." It seems to me that under that rule there is a plain direction that this proof is to be by a "medical certificate, or other sufficient evidence of incapacity and the cause thereof." There is not a word there to indicate or suggest that a medical certificate is only to come from a panel doctor; and manifestly in many cases the certificate will be a much more satisfactory certificate if it comes from the doctor who has been in attendance on the sick man, whether that doctor happens to be a panel doctor, or whether the doctor who has been attending on the sick man is not a panel doctor. What have the Foresters Society done here? They in effect say that although this is the provision of rule 5, we will only accept the proof of the incapacity and the cause thereof if that is proved by what? By a medical certificate of a panel doctor. I do not think that the society had any right beforehand to limit the class or kind of evidence in that way. I think that they were bound, as each case came up, first to take the evidence; and then, having received the evidence of the medical certificate of the doctor who had been in attendance, either a panel doctor or any other doctor whose connection with the case enabled him to give a certificate, or indeed any other sufficient evidence, I think it is wrong for the society to say beforehand: Here we pass a resolution or rule, or whatever you may call it, under which you are compelled to produce, as the evidence of the condition of

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health and the cause, the certificate of a panel doctor, and not a certificate of any other doctor. That being so, it really has not been disputed but what there may be cases in which an injunction would properly be obtained against the society from doing things which are beyond the power of the society or ultra vires. That is not denied. I asked to have a line drawn. If it is admitted that such an injunction may properly be issued in cases where that which is done is ultra vires or beyond the powers, and especially if it is done in a case which is intended to control the future action of the society and create a limitation of this kind to that sort of evidence, I ask where is the line to be drawn? You have got to draw a line and say that this particular instance comes on the side of the line which would leave this as a matter which, although in a sense beyond the powers of the society, would not justify the Court in granting the injunction. When I asked that question I got no line drawn at all. There was the suggestion made that, even if the particular thing complained of was ultra vires, and beyond the powers of the friendly society, yet, if it was in reference to domestic matters and the internal administration of the business of the society, there could not be an injunction issued, even though it was asked for, upon the ground that it was ultra vires. I quite agree there. There are such matters, matters of internal administration, in respect to which there ought not to be an injunction granted. These things are properly left to be decided by arbitration. But when you come to a matter of this sort, which really interferes with the rights of those who are entitled to sickness benefits to come and prove what the condition of their health is, and what the cause of it is, by saying, "You shall only prove, which really is a condition precedent to enable you to get these benefits, by calling a particular class of medical man and producing his certificate, that is to say, the certificate of a panel doctor," I think that it is ultra vires, and I think that we have a right and a duty to prevent that sort of action by a friendly society. I do not quite know how Bailhache J. limits it himself in his judgment. He says this at the end of it: "Two views have been put before me: one is on behalf of the plaintiff that the insistence on the panel doctor is such a curtailment of

his legal rights under the Act, and under the rule which I have read, law 12, rule 5, as to be an illegal act of the branch of the Order of Foresters with which we are concerned; an illegal act of the sort that the Courts will interfere with and restrain, notwithstanding the arbitration provisions in s. 67 of the Act. On the other hand, it is said that this is a matter of internal administration. It may be perhaps a matter about which there would be a considerable difference of opinion: it may be a reasonable thing to object to the resolution; but it is not such an illegal act as the Courts will interfere with: it is not an illegality so far ultra vires as to take it outside the arbitration section, s. 67, of the National Insurance Act. It is a matter relating to domestic administration, and it is a matter which comes within the provisions of s. 67 of the National Insurance Act. It is between those two conflicting views that I have to decide, and I have come to the conclusion that the second view put before me is right, that the resolution passed is not such an illegal act on the part of this branch of the Ancient Order of Foresters as to justify an action being brought in respect of that. It is a matter which, in my judgment, ought to go under s. 67 to arbitration as between Mr. Heard and the officers of the society in which he is insured, and ought not to go to the Courts." Well, I really think that I am right in supposing that the real distinction drawn by Bailhache J. is this: that he treats this as a matter relating to domestic administration. I can only say that I do not agree. It seems to me that this is a case where the right of the sick man to the relief is conditioned simply on his giving sufficient proof, either by medical certificate or in some other way satisfactory to the society, of the condition of his health and its cause. In my judgment, the right in a man to give evidence of that, not evidence drawn from a particular class, but any satisfactory evidence, and certainly any medical certificate, is not a matter to be decided by the arbitration body in the society, but is a matter which ought to be decided in the Courts. I do not wish to delay what I have got to say any more; but I think I ought, before I conclude what I have got to say, to read s. 67 of the National Insurance Act, 1911: "(1.) Subject to the provisions of the foregoing section every dispute between (a) An approved

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society or a branch thereof and an insured person"—and then various things are set out, until you come to (d): "Any two or more branches of an approved society; relating to anything done or omitted by such person, society, or branch (as the case may be) under this part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners. (2.) Every dispute between an insured person and the insurance committee, relating to anything done or omitted by such person or the insurance committee under this part of this Act, or any regulation made hereunder, shall be decided in the prescribed manner by the Insurance Commissioners." It is a longish section, and I will not read it all now; but, as I understand the arbitration provisions in this Act, they do not go to every dispute which may arise between a member and his friendly society. It is plain on the authorities that we heard to-day, and I will not go through them again, that although there are many cases which must go to arbitration, there are cases in which the real question is whether or not the society are doing or trying to do something which is ultra vires, and which ought not to be tried by the society, but ought to go into Court. I think, therefore, this appeal must be allowed.

HAMILTON L.J. I am of the same opinion. With every respect for the judgment of Bailhache J., I am unable to agree with him. The action is brought for a declaration that a certain resolution passed on January 15, 1913, is illegal, ultra vires, and unenforceable. That is a dispute between the member and the society. The dispute is not whether the member shall be paid 5s. or some other sum for sick pay overdue, but whether or not that resolution is ultra vires and unenforceable, and I think that it is. It is called a resolution. Under what circumstances it was passed has not been brought to our notice; nor do I think that it would be material whether or not the formalities prescribed by the general law²⁹, section 2, were observed, so as to make it technically a new rule of a court. That seems to me not to make any difference.

The secretary's letter, which has been read, is strong evidence that it was at any rate a resolution binding upon members, and which it was compulsory upon them to obey. Therefore, in the only aspect of it which is material for this purpose, namely, its aspect as prejudicing the rights of the member, the plaintiff, it appears to me to be in the nature of a rule. Whether it be called a rule or a regulation, its effect is that it operates, and operates immediately, to prejudice him in certain rights which the statute has given him. It is true, also, that it has never been submitted for the approval of the Insurance Commissioners; nor even been registered with the Registrar of Friendly Societies. Neither of those points appears to me to matter on the present occasion, because both are irregularities which might be cured. The objection to this rule is in the intrinsic character of it. The case of *Andrews v. Mitchell* (1), in the House of Lords, I think is clear authority, not only that there are acts done by friendly societies with regard to members which, when contested by the members, do not constitute a dispute which falls within the arbitration section, but also as indicating one, at any rate, of the main features by which such acts may be judged and identified. Lord Robertson says (2): "The Act of 1896 has not given carte-blanche to the tribunals of these societies to pronounce decisions which shall be exempt from examination in Courts of law. The decisions protected from review are constitutional decisions—decisions pronounced according to the rules, which, as we know, are registered under the Friendly Societies Acts. Now the rules require written notice of a charge such as we are here dealing with. In proceedings involving the grave issue of expulsion the importance of this safeguard stands out as salient. What happened in this case shews what may take place if this rule be disregarded. This respondent, called to answer a minor accusation, is, on the trial of that charge, then and there accused of another and graver charge, and then and there expelled. This invasion of the respondent's rights most clearly transcends the class of irregularities, and calls for the intervention of the Courts." It is noticeable in that case

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(1) [1905] A. C. 78.

(2) [1905] A. C. at p. 83.

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that in the first instance before Darling J., then in the Divisional Court, and then in the Court of Appeal, *Andrews v. Mitchell* (1) had been dealt with upon the authority of *Palliser v. Dale* (2), that is to say upon the narrow ground that a society which had purported to expel its member was not entitled thereafter to say to him, "You are a member, and are bound by the clause which submits disputes between the member and the society to the arbitration committee." The House of Lords preferred to place their decision upon the very much broader ground: that what was done there by the arbitration committee was, in the words of Lord Robertson, an invasion of the plaintiff's rights. I do not in any way criticize the reasons or the motives with which the resolution may have been passed. I assume them to have been good, and dismiss them as immaterial. The effect on the plaintiff, and upon all the other members in his position, is this. By the words of the statute he is entitled, in the manner and subject to the conditions provided by the Act, to the benefits in respect of that health insurance for which he must, by compulsion of law, pay. It is administered through societies like the defendant society; and they, exercising their powers under s. 14, sub-s. 2, to provide for the application of their existing rules or make new rules with regard to proof of disease, have passed regulations which we have in their supplemental book of rules. Those are rules and regulations in the strict sense; and they provide that the proof of incapacity for work, which there must be in any case, may be given by a medical certificate or other sufficient evidence of incapacity, a rule framed with perfect good sense and clearness. Whether, when they were passing this present resolution or not, they were acting under the powers of rule 10, sub-section 7, of their part 2, "A court of the Order may by resolution provide for continuance of their present system of providing medical attendance and treatment," and so forth, or not, I do not know. If they were, they were providing for, among other things, the application to the national health insurance business of an old rule which provided for a certificate from some qualified medical practitioner being sent to the secretary. If they were purporting

(1) [1905] A. C. 78.

(2) [1897] 1 Q. B. 257.

to make a new rule, and if it is to be presumed that they did make a new rule, then they were supplementing their ordinary book of general laws; but they were either, in the words of the statute, providing for the application of the existing rules, or they were making new rules; and the provision or new rule was that whereas under their rule 12, sub-section 5, any sufficient evidence might be availed of by the incapacitated member, now, in lieu thereof, no case is to be considered at all unless there is evidence in the shape of a certificate from a panel doctor. They were laying down a principle for the direction of the secretary in the first instance, and, as far as I can see, for the guidance of their arbitration committee in the second, namely, that persons whose business it is to estimate sufficiency of proof are to exclude from the evidence which they are to admit a class of evidence which is in itself competent, qualified, unexceptionable and material, because informed by direct knowledge of the facts. The secretary in the first instance has to say whether he will accept the application or not. In the case of a sick person, it may well be a hardship that he should then be remitted to the court, or a committee of management as the superiors of the secretary; and, if he has to take his case further, be hindered by a resolution which compels them to exclude evidence which is in itself perfectly sufficient, perfectly competent, and may be the only obtainable evidence, and to bar his claim because he has not a certificate of one particular class of doctor. That appears to me substantially and directly to take away from him a portion of his right to benefits in respect of health insurance conferred by this part of the Act, within s. 1, sub-s. 1; and, if that is so, it "transcends the class of irregularities, and calls for the intervention of the Courts."

Cases have been cited to us which I will only name, because I think they may be all distinguished upon one ground; and that is that they are cases where the dispute was a dispute as to the rights of the members of the society respectively, according as a rule was construed one way or another way; they are cases in which it was held that whether the tribunal had construed the rule properly or not, it had jurisdiction to do so, and its decision must be upheld; or, where it had not gone to the tribunal,

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the matter turned upon the construction of a rule, and the short answer was that if that rule worked the injustice that was complained of, the irregularity could be cured by passing another and better rule. The cases are *Stone v. Liverpool Marine Society* (1); *Catt v. Wood* (2), in this Court and in the House of Lords; and the case before Warrington J. of *Cox v. Hutchinson*. (3) As I said, all the cases in question are cases where, to use the language of Warrington J. in the last-named case, "The question is whether certain acts of the committee purporting to bind the society were or were not within the powers of the society. That depends upon the construction of the constituent documents of the society, that is, the rules and the Act under which the society is registered. But a dispute relating to the rules appears to be exactly within the purview of s. 49." This is not a dispute relating to the rules. In fact it is urged upon us that the resolution impugned is not a rule. This is a dispute with reference to the Act, and with reference to general principles of law, as to whether a resolution, which has been put in force, is not, in truth, of no force but entirely invalid. Therefore I am of opinion that those cases do not assist us, or assist the respondents in this case.

With regard to the contention that, if opportunity were given, evidence might be given that would in some way affect this matter, I have been unable to grasp what evidence can be suggested which would in any way alter or assist the determination of this question. We have the resolution; we have the statement that it is binding; we have the positions relatively of the plaintiff and of the defendants; and we must judge for ourselves whether that resolution so framed invades his rights under the statute or does not. I think, therefore, that the appeal must succeed, that the judgment below must be set aside, and that the plaintiff is entitled to the declaration prayed for, with the usual consequences as to costs.

BRAY J. I am of the same opinion. I think this appeal should be allowed; and the reasons have been already so very

(1) 63 L. J. (Q.B.) 471.

(2) [1910] A. C. 404.

(3) [1910] 1 Ch. 513.

fully stated that I desire to add very little. The learned judge, I think, put the right question to himself, as to whether this was such an illegal act as the Courts will interfere with and restrain, notwithstanding the arbitration provision; or whether it was a mere matter of internal administration. The mistake which I think he made was in coming to the conclusion that he did, that this was a matter of internal administration. It was not, in my opinion, a matter of internal administration. For some reason or another which I need not stop to ascertain, this society seemed to have desired to evade or restrict the existing rule, which had been passed and approved by the Insurance Commissioners. It is quite clear that the resolution they passed was a very grave restriction on that rule. The rule provided that he should be entitled to sickness benefit, if a medical certificate or other sufficient evidence of incapacity and the cause thereof were produced. The resolution provides that there shall be neither of those two alternatives, but a medical certificate from a particular class of doctors. That is a matter which it seems to me is not internal administration, but a matter of vital importance, as improperly restricting the rights of insured persons. That being so, it seems to me that we have jurisdiction to decide this question; and, once we have arrived at that conclusion, there cannot be a doubt that it follows from that that this resolution was illegal.

It was strongly pressed upon us by Mr. Neilson that we should send this back again to try, because only the preliminary point had been decided; but we have got all the materials here that are necessary for this purpose. We have got the rules; we have got the resolution; we have got the letter of the secretary, which shews that the society were insisting upon its validity, and acting upon it, and were refusing sick relief to the plaintiff on account of the resolution which had been passed. It seems to me that the plaintiff is entitled here to have a declaration to the effect claimed; and, therefore, I think that this appeal should be allowed.

VAUGHAN WILLIAMS L.J. The injunction asked for runs in these words: "An injunction to restrain the defendants from acting upon the said resolution, and from refusing to accept and

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C. A. consider such certificates as such evidence." That ought to be
 1913 limited to the present party to the action, the plaintiff. It

 HEARD should run: "refusing to accept from the plaintiff," otherwise it
 v. might go too far.
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Appeal allowed.

Solicitors for plaintiff: *Oswald Hanson & Smith.*

Solicitor for defendants: *H. F. Parker Roberts.*

W. J. B.

K. B. D.

[IN THE KING'S BENCH DIVISION AND IN THE
COURT OF APPEAL.]

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Nov. 18.

ASTON v. KELSEY.

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April 17, 18;
May 7.

Stock Exchange—Principal and Agent—Right of Broker to Indemnity from Client.

The plaintiff, a country stock and share broker, was employed by the defendant as his broker to make purchases of shares for him subject to the rules, regulations, and customs of the stock exchanges through which the transactions took place. The plaintiff gave orders for the purchase of the shares to brokers on the London and Glasgow Stock Exchanges, who thereupon bought the shares from a jobber, and sent a bought note to the plaintiff charging "7s. 6d. net" for the shares, the price at which they bought from the jobber not being disclosed. The plaintiff then sent a bought note to the defendant, charging him 7s. 6d. for the shares (without adding the word "net") plus a commission of 1½d. per share and 1s. for the stamp. The amount added by the London and Glasgow brokers for their remuneration did not exceed the usual commission payable in respect of such a purchase. In an action brought by the plaintiff against the defendant for an amount alleged to be due to him in respect of the above-mentioned transactions:—

Held by Hamilton L.J. and Bray J. (Vaughan Williams L.J. dubitante), that the contracts effected by the plaintiff were made through the London and Glasgow brokers as agents and were not made with them as principals, that they were accordingly in accordance with the authority given to the plaintiff by the defendant, and that the plaintiff was therefore entitled to be indemnified by the defendant in respect of them.

Johnson v. Kearley [1908] 2 K. B. 514, distinguished.

APPEAL from a decision of Bailhache J. at the trial of the action without a jury under Order xiv., r. 8.

The plaintiff, who carried on business as a stock and share broker at Harrogate under the style of Aston & Co., sued the defendant to recover 848*l.* 5*s.*, the balance of an account rendered for sales and purchases of stocks and shares effected by the plaintiff for and on behalf of the defendant, and for commission payable by the defendant to the plaintiff in respect thereof.

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The following statement of facts is taken from the judgments of Vaughan Williams L.J. and Bailhache J.

(a) The plaintiff was employed by the defendant as his broker to make purchases for him subject to the rules, regulations, and customs of the stock exchanges through which the transactions took place.

(b) The defendant bought the material shares, as to some of them through a Mr. Hughes, a member of the Glasgow Stock Exchange, and as to others of them through a Mr. Lumsden, a member of the London Stock Exchange.

(c) In every case these gentlemen bought from jobbers on their respective exchanges in the orthodox fashion.

(d) When they had so bought they sent bought notes to the plaintiff in which they set out the price which they were charging, generally, but not always, adding to that price the word "net." Whether that word was added or not, the price stated by them was the price at which they had themselves bought from the jobbers plus a sum to cover their commission, and was so understood by the plaintiff. The amount of commission charged was not in fact disclosed to the plaintiff, and there was no evidence that the plaintiff knew what the amount was, but it was proved to be, in the case of the shares bought through Mr. Hughes, 1½*d.* per share, and in the case of the shares bought through Mr. Lumsden 6*d.* per share.

(e) Both those sums were reasonable. In Mr. Hughes' case the 1½*d.* was half what he was entitled to charge by the rules of the Glasgow Stock Exchange. In the case of Mr. Lumsden there was no relevant rule, but the amount charged was reasonable.

(f) In both cases the method adopted was in accordance with the practice obtaining on the respective exchanges, and in the Glasgow transactions was in accordance with the rules of that exchange.

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(g) The bought notes as received by the plaintiff were not communicated to the defendant, but the plaintiff sent him a bought note in which the price of the shares was set out at the price charged by the Glasgow or London brokers, as the case might be, without, however, the addition of the word "net," and a further sum was added and shewn as the plaintiff's commission.

The following is a specimen of the bought notes delivered by the brokers on the Glasgow and London Stock Exchanges to the plaintiff:—

166, Buchanan Street,
Glasgow,
7th April, 1911.

Messrs. A. E. Aston & Co.,
Harrogate.

Broker's A/c.

Bought on your account as under subject to the Rules of the Glasgow Stock Exchange.

No. or Amount.	Company.	@	Price.	Commission and Contract Stamp.	Amount.	For a/c.
500	United Rhodesia	7/6 net	£187 10 0		£187 10 0	27 Apl.

I beg to advise as above.

Yours faithfully,

G. J. Hughes.

The following is a specimen of the bought notes sent by the plaintiff to the defendant:—

Crown Chambers,
12, Princes Street,
Harrogate,
April 7th, 1911.

A. J. Kelsey, Esq.

Dear Sir,

We beg to advise having BOUGHT the undermentioned securities for your account, subject to the Rules, Regulations, and Customs of the Stock Exchange through which the transaction has taken place.

	Price.	Rate of Commission.	Net Commission. £ s. d.	£	s.	d.	C. A 1913
500 United Rhodesia Gold-fields Ltd. shares ..	7/6	1½d.	3 2 6	190	12	6	ASTON v. KELSEY.
Government Transfer Stamp Company's Registration Fee Contract Stamp					1	0	
				190	13	6	

Yours faithfully,
A. E. Aston & Co.

For the April 27, 1911, Account.

The various shares were carried over from time to time, having been purchased by the defendant merely as a speculation. The shares fell in price on the market, and the defendant being unable to pay for them, the plaintiff was obliged to sell them and to pay the loss. He brought this action for an indemnity against his liability incurred as broker, and to recover the money which he had had to pay on behalf of the defendant. The defendant raised the defence that the transactions were in the nature of gaming and wagering contracts, and void under the Gaming Act. The learned judge held that the transactions were not gaming and wagering contracts, and that this defence failed.

1912. Nov. 18. The following judgment was read by

BAILHACHE J. In this case Mr. Aston, a stockbroker at Harrogate, brings an action against Mr. Kelsey, a client of his, for moneys which the plaintiff has had to pay on the defendant's behalf—in other words, for indemnity.

The circumstances are familiar. The defendant speculated in stocks and shares, employing the plaintiff as his broker. The shares fell; the defendant was unable to pay, and the broker had to pay. The defendant raised the usual defence of gaming and wagering. That defence failed and need not be further referred to.

The defendant raised the further defence that his authority

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to the plaintiff was to make for him contracts with principals through the medium of brokers on recognized stock exchanges, such as London and Glasgow; that this authority involved the fact that the brokers through whom his business was done on those exchanges should themselves act as brokers and not as principals; and he contended that, upon the facts proved in this case, those brokers had acted as principals and not as brokers, and that therefore he was not liable to indemnify the plaintiff against the payment he had been compelled to make by the defendant's failure to provide him with the necessary money. [His Lordship here read the facts already set out, and proceeded:]

The defendant contended that these facts brought the case within the decision of the Court of Appeal in *Johnson v. Kearley*. (1) This necessitates a close consideration of what the decision in that case really is, and I have come to the conclusion that that case goes the length of deciding that when a London broker employed by a country broker to buy shares for a client of the country broker buys in ordinary course from a jobber, but sends to the country broker a bought note in which the purchase price is stated to be "net,"—that is to say, a price which covers the actual bought price and also the broker's commission, but does not quantify the commission—the London broker is, in effect, himself "making a price" to the country broker and is acting as principal and not as broker; and I gather from *Johnson v. Kearley* (1) that it is so though the country stockbroker has in truth and in fact bought as a broker from the jobber. If that is a correct interpretation of *Johnson v. Kearley* (1), it governs this case, unless the facts are in principle distinguishable.

Counsel for the plaintiff says they are, in two respects. First, in this case the charge made by the Glasgow and London brokers was uniform. In *Johnson v. Kearley* (1) it was capriciously varied by the London broker. I am unable to see that this makes any difference in principle. The vice apparently is not the amount of the charge or its variation, but its non-disclosure. In neither case was the amount known to the

(1) [1908] 2 K. B. 514.

country stockbroker, much less to his client, and in neither case did the country stockbroker appear to treat the matter as any concern of his. Secondly, in this case the method of rendering the bought notes by the Glasgow and London brokers was said to be in accordance with the practice of both exchanges and with the rules of the former, whereas in *Johnson v. Kearley* (1) the method was said to be by special arrangement between the London and country brokers. This again makes no difference, if I have rightly interpreted *Johnson v. Kearley* (1), because I take it to be clear law that a broker cannot act as principal in a transaction in which he is employed as broker without the clearest notice to his principal. Here there was no such notice, and it is not suggested that the practice or rule was in fact known to the defendant.

Counsel for the plaintiff relies strongly on the case of *Stubbs v. Slater*. (2) The facts of that case are very different from the present. *Johnson v. Kearley* (1) was cited to the Court of Appeal in that case in argument. I cannot, however, find that the Court disapproved of *Johnson v. Kearley* (1), or felt embarrassed by it in any way, and I must follow *Johnson v. Kearley*. (1) One difference between the two cases may be noted, and that is that in *Stubbs v. Slater* (2) the note sent by the broker to his client contained the word "net"; in this case it did not. *Stubbs v. Slater* (2) largely turned on the meaning and effect of that word.

If this case had not been covered by authority, my own opinion would have been in the plaintiff's favour. I should have thought that the method of charging commission adopted by the Glasgow and London brokers was an element to be considered and weighed with the other elements in the case, but not of itself conclusive. This, however, is only to say that my view would have been the same as that of Farwell L.J., the dissenting judge in *Johnson v. Kearley*. (1) I may add that the view I have expressed of what *Johnson v. Kearley* (1) did actually decide is greatly strengthened by Farwell L.J.'s statement of the effect of that decision in his dissenting judgment at p. 913 of the report in the *Law Journal*. (3)

(1) [1908] 2 K. B. 514.

(2) [1910] 1 Ch. 632.

(3) 77 L. J. (K.B.) 904.

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The passage to which I refer is this: "The contention, as I understand it, is this: The employment of a broker on the Stock Exchange necessitates not only the purchase by him from a jobber on the client's behalf, but also the charge of a brokerage commission. In this case no such commission is charged *eo nomine*; therefore the broker cannot have been acting as broker, but must be regarded as a principal. As my learned brothers, as well as Bucknill J., think this is correct, I have great diffidence in adhering to my own opinion." There will therefore be judgment for the defendant, with the general costs of the action, the plaintiff bearing the costs on the issue of gaming and wagering.

The plaintiff appealed.

1913. April 17, 18. *Atkin, K.C.* (*McCardie* with him), for the plaintiff. Bailhache J. was wrong in thinking that the case was concluded by the authority of *Johnson v. Kearley*. (1) That case is distinguishable on the facts from the present case. In the present case the brokers on the London and Glasgow Stock Exchanges contracted with jobbers in the ordinary way and sent bought notes to the country brokers in which a net price was charged in accordance with the practice of those stock exchanges, whereas in *Johnson v. Kearley* (1) the London brokers charged a net price by special arrangement with the country brokers. Further, the commissions charged by the London and Glasgow brokers never varied; they were not arbitrary sums such as were charged in *Johnson v. Kearley*. (1) That case was decided by the majority of the Court of Appeal on the ground that on the evidence the London brokers were selling as principals to the plaintiff and were not acting as agents for him and through him for the defendant. Bailhache J. draws the inference that the plaintiff through his London and Glasgow brokers acted as a principal from the fact of the contract notes being rendered "net"; but that cannot be conclusive: see *Stubbs v. Slater*. (2) There was a complete performance of the mandate on the part of the plaintiff, because the London and Glasgow brokers created privity of contract

(1) [1908] 2 K. B. 514.

(2) [1910] 1 Ch. 632.

between the respective jobbers and the country client, the defendant. The London and Glasgow brokers were acting for the country broker for his undisclosed principal, the defendant.

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Bairstow, K.C. (*A. H. Marshall* with him), for the defendant. It is not disputed that the plaintiff had a right to buy the shares on whatever stock exchange he considered best, but that did not authorize him to charge his client with what he had to pay for them. The defendant never knew that he was paying commission other than that which appeared on the face of the contract. *Johnson v. Kearley* (1) is conclusive to shew that the authority exercised was not the authority given. The plaintiff might have told the defendant the terms of the arrangement with the London and Glasgow brokers and have passed on the contracts entered into with them, but he did neither. The evidence shews that the country broker, the plaintiff, did not employ the London and Glasgow brokers to buy from the jobbers, but himself bought from them.

Atkin, K.C., in reply.

Cur. adv. vult.

1913. May 7. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case Bailhache J., the judge before whom the case was tried without a jury, said, “If this case had not been covered by authority, my own opinion would have been in the plaintiff’s favour.” Bailhache J. held that this case was covered by authority, that is, by the authority of *Johnson v. Kearley* (1), and the question is whether he was right in so holding. It is said that the facts in the case of *Johnson v. Kearley* (1) are very different from the facts of the present case. I agree that they are, but before dealing with the details of difference I wish to point out that in my judgment the judgment in *Johnson v. Kearley* (1) lays down this proposition—that the right to indemnity depends upon the broker having carried out his mandate, and that if the mandate is a mandate to the broker to purchase from a broker on the Stock Exchange, that mandate does not justify a broker acting as principal in a transaction in which he is employed as a broker without the clearest notice to his

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employer. So far as this proposition is concerned I do not understand that any one controverts that this is a proposition of law laid down in *Johnson v. Kearley* (1) and is a proposition which was in no sense obiter, but relevant and essential to the case before the Court, and the question in this case is whether on the facts proved in the case it does appear that the plaintiff through his London broker acted as a principal. Bailhache J. has found that he did, no doubt acting upon the authority of *Johnson v. Kearley* (1), as he understood it, and the real question is whether that finding of Bailhache J. can on the facts proved in evidence be justified. The facts found by Bailhache J. are: (a) The plaintiff was employed by the defendant as his broker to make purchases for him subject to the rules, regulations, and customs of the stock exchange through which the transactions took place. (b) The plaintiff bought the material shares, as to some of them through Mr. Hughes, a member of the Glasgow Stock Exchange, and as to others through a Mr. Lumsden, a member of the London Stock Exchange. (c) In every case these gentlemen bought from jobbers on their respective exchanges in the orthodox fashion. (d) When they (Hughes and Lumsden) had so bought they sent bought notes in which they set out the price which they were charging, generally but not always adding to that price the word "net." Whether that word was added or not, the price stated by them was the price at which they had themselves bought from the jobbers, plus a sum to cover their commission, and was so understood by the plaintiff. The amount of commission charged was not in fact disclosed to the plaintiff, and there is no evidence that the plaintiff knew what that amount was, but it was proved to be in the case of the shares bought through Mr. Hughes 1½*d.* per share, and in the case of shares bought through Mr. Lumsden 6*d.* per share. (e) Both these sums were reasonable. In Mr. Hughes' case the 1½*d.* was half what he was entitled to charge by the rules of the Glasgow Stock Exchange. In the case of Mr. Lumsden there was no relevant rule, but the amount charged was reasonable. (f) In both cases the method adopted was in accordance with the

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practice obtaining on the respective exchanges, and in the Glasgow transaction was in accordance with the rules of that exchange.

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Bailhache J. went on to say: "The bought notes as received by the plaintiff were not communicated to the defendant; but the plaintiff sent him a bought note in which the 'price of the shares were set out at the price charged by Glasgow or London, as the case might be, without, however, the addition of the word 'net,' and a further sum was added and shewn as the plaintiff's commission." Bailhache J. then referred to the specimen bought note appearing on p. 9 of the correspondence, which is in the following terms:—

166, Buchanan Street,
Glasgow,
7th April, 1911.

Messrs. A. E. Aston & Co.,
Harrogate.
Broker's A/c.

Bought on your account as under subject to the Rules of the Glasgow Stock Exchange.

No. or Amount.	Company.	@	Price.	Commission and Contract Stamp.	Amount.	For a/c.
500	United Rhodesia	7/6 net	£187 10 0		£187 10 0	27 Apl.

I beg to advise as above.
Yours faithfully,
G. J. Hughes,
Member of the Glasgow Stock Exchange.

and said, "The defendant contended that these facts brought the case within the decision of the Court of Appeal in *Johnson v. Kearley*" (1), and ultimately decided in favour of this contention.

In order to make plain the method adopted in carrying out the instructions given by the defendant to the plaintiff Aston, I will take the above account which Hughes on April 7, 1911, sent to Aston, and compare it with the account of April 7, 1911,

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C. A. sent by Aston to the defendant. The latter is in the following
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Crown Chambers,
12, Princes Street,
Harrogate,
April 7th, 1911.

A. J. Kelsey, Esq.

Dear Sir,

We beg to advise having BOUGHT the undermentioned securities for your account, subject to the Rules, Regulations, and Customs of the Stock Exchange through which the transaction has taken place.

	Price.	Rate of Commission.	Net Commission. £ s. d.	£	s.	d.
500 United Rhodesia Gold- fields Ltd. Shares ..	7/6	1½d.	3 2 6	190	12	6
Government Transfer Stamp Company's Registration Fee Contract Stamp					1	0
				190	13	6

Yours faithfully,
A. E. Aston & Co.

For the April 27, 1911, Account.

These two documents constitute the transaction. One instance is sufficient to make the method clear. The first step is plainly a purchase for the account of Aston by Hughes. The second step is a purchase by Aston on account of Kelsey. The London transactions are the same in method.

It is said that these transactions differ from the transactions in *Johnson v. Kearley* (1) in two particulars ; for in that case the Lumsden transaction included a charge for Lumsden's remuneration arrived at according to how the bargain appeared, that sometimes the business was done for nothing and the intention was that the business should appear well done, and that Lumsden & Co. should charge their commission accordingly ; that all the bought

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notes between Lumsden & Co. had the words "net price," and Evans stated that net price meant purchase price plus their remuneration, and that there was no fixed scale of remuneration; that their habit with the plaintiff on receiving his order to buy was to go into the house, get a price, and wire him the price if he bought it net, and then send a purchase note. Further, that the plaintiff would not pass on to the defendant the actual price at which Lumsden & Co. bought from the jobber.

Now to my mind the principal differences here appearing are (a) the uncertainty of Lumsden's charges and (b) a certain variety in the use of the word "net." I recognize the differences, but I am impressed with the fact that the account rendered by Aston to Kelsey does not disclose in any way the first stage in this transaction, that is to say, the bought note rendered by Hughes to Aston. Why not? Does not this suggest that Aston knew perfectly well that he was not carrying out the mandate given to him, and that is why he did not send the bought note sent to him by Hughes? The account appended to the bought note rendered by Aston to Kelsey also does not disclose the true transaction.

I suppose that the inference that the plaintiff's counsel would have drawn from this course of business is that there is no departure from the mandate, and that notwithstanding the succession of bought notes the whole transaction was in substance one transaction, executed by Aston through brokers on the Stock Exchange on behalf of Kelsey, his principal. I think that is the view taken by my brethren and more or less by Farwell L.J. in *Johnson v. Kearley*.(1) I hesitate to accept this view of the transaction, thinking as I do that although in this case, as indeed in *Johnson v. Kearley* (1), there was no dishonest mind and no pecuniary loss, yet it is a dangerous thing to recognize a practice on the Stock Exchange as proper, which sanctions the omission by the broker acting on a mandate to mention at all the transaction which in substance is contended to be the execution of the mandate—it is a plan of operations which would open a convenient method of dishonesty to dishonest brokers. Sitting alone, I do not think I could have recognized what has happened

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C. A. in this case as an execution of the mandate, but I have persuaded
1913 myself not to dissent from my brethren and to distinguish on
the facts this case from *Johnson v. Kearley* (1), first, because they
ASTON take the view that what was done here by the plaintiff was an
v. execution of the mandate, which is, I suppose, a conclusion in
KELSEY, fact based on the evidence of Stock Exchange practice, and,
Vaughan secondly, because in this case there is no dishonesty and no
Williams L.J. pecuniary damage.

HAMILTON L.J. read the following judgment :—The plaintiff in this case sued for an indemnity against liabilities he had come under (and had discharged) by acting as the defendant's stock-broker at his request, and his claim also included his own commissions. The defendant contended that he was not bound to indemnify the plaintiff at all, on the ground that the plaintiff, instead of executing his mandate by acting as a broker and employing others who also acted as brokers, had disregarded his mandate, firstly, by dealing and dealing net with the brokers through whom he carried out the transactions, and secondly by calling on the defendant to bear those brokers' commissions instead of bearing them himself.

The first point was successful before Bailhache J., the second failed. Both have been argued before us, and I may shortly dispose of the second. The learned judge did not find in favour of the defendant that by the terms of the plaintiff's employment his commission was to be an inclusive commission to cover all expenses that might be payable in carrying out the defendant's orders. In this he was right. The evidence would not have supported such a finding. The defendant must have contemplated that the plaintiff would have to do the business on stock exchanges at a distance from Harrogate, and there employ brokers who must be remunerated. There is nothing to shew that he bargained that for this he should not pay. A finding to the contrary is involved in the learned judge's statement of the facts and I agree with it. Moreover, I am quite unable to see how the plaintiff can lose his right to be indemnified against the price of shares duly bought, merely because he wrongly asks his client to pay

the London broker's commission. Why should he lose the first indemnity because he erroneously asserts a right to a second? The two things are quite separate. The obligation to indemnify the London broker against his obligation to the selling jobber for the price is one thing; the obligation to pay the London broker his proper commission for services duly rendered is another. If the plaintiff were disentitled to recover any indemnity because he had never bought from a London jobber through a London broker at all, he would also be disentitled to ask for indemnity against commissions paid in the course of executing unauthorized transactions. But the converse does not hold. It would be enough to say that so much of his claim fails as represents remuneration to the London broker, if the bargain was that he should bear it himself. His claim for indemnity as to the price would be unaffected. There is nothing in the second point, if it is treated as a distinct one from the first.

With the utmost respect for the opinion of Bailhache J. on the first and main point, I am unable to agree with it. He has not actually found as a fact that, apart from the form of the contract notes, all that the plaintiff did was in due execution of a mandate to act for the defendant as his broker, but this is only because he thought that *Johnson v. Kearley* (1) prevented his doing so. All the preliminary facts which afford the materials for drawing a final inference upon that question he found in the plaintiff's favour, and I agree with his findings. I think he was in error in supposing that *Johnson v. Kearley* (1) bound him to attach a capital significance to the word "net" in the contract notes. The central fact in *Johnson v. Kearley* (1) is that the country broker and through him the London broker were employed to make contracts of purchase from a London jobber and did not do so. The first bought from the second. In the present case the central fact is that, the employment being the same as before, both brokers acted in accordance with it. The shares were bought from a London jobber. Although it is right to weigh the different pieces of evidence one by one before arriving at a conclusion of fact, it must be remembered that the conclusion of fact upon the question whether or not the broker has acted in accordance with his

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employment is a conclusion from the whole of the facts taken in combination and does not necessarily follow from any one of them taken separately or in a different combination. Farwell L.J., dissenting, spoke of the decision of the majority in *Johnson v. Kearley* (1) as a decision that all Stock Exchange transactions are to be deemed to be between principals, when a commission is not charged by name on the face of the contract note, but this was his *reductio ad absurdum* of a conclusion of fact with which he did not agree. The majority of the Court neither say nor imply this. Farwell L.J. brings into prominence the form of the contract note because, little as he thought of its significance, he thought less of the significance of the other facts proved. The majority thought them all-important and acted accordingly. Sir Gorell Barnes P. carefully says (2) that "the appeal raises no new question of law but depends entirely on the facts of the case, that is to say, in effect, upon whether the inference which the learned judge has drawn from the materials placed before him was correct or not." Both he and Fletcher Moulton L.J. decide the matter as one of fact, and Farwell L.J. (3) says that he agrees with them on all questions of law. The parol evidence of both parties to the transaction shewed that the London broker acted as a dealer. He made a price to the country broker, and the latter expected that he also made a profit and he did. He made arbitrary additions to the price at which he had acquired the shares. Hence the country client did not get the benefit, such as it might be, of the jobber's price, but had to pay a different price. True she escaped paying the London broker any commission, and would have been more out of pocket if she had been given the benefit of the jobber's price but had been required to pay the regular broker's commission, but that did not shew that her mandate had been performed; it only shewed that she was not in this one respect any worse off in consequence of its having been disregarded. There is no denying that she did not get the benefit of the London broker's skill in bargaining with the jobber. If the broker accepted a higher price than he might have obtained, he made up for it by

(1) [1908] 2 K. B. 514.

(2) *Ibid.* at p. 520.(3) *Ibid.* at p. 531.

loading the price with a smaller profit to himself than he otherwise would have added, but that is not the same thing. The client is entitled to the disinterested judgment of his broker, when buying, and cannot be put off with the chance of his self-sacrifice and moderation in making his own charge afterwards. There are other dangers and disadvantages attending such a mode of dealing, and the judgments dwelt upon them. As to the form of the bought note, it was of minor importance in this combination. It bore out the character of the transaction as described in the evidence. It shewed the danger of injustice to the client by lending itself to deception. But the point of the decision is not that a broker must charge a commission and say so, or else be deemed to be a dealer, whether he be so or not; it is that, if employed as a broker, he must act as a broker, and on all the facts of that case he did not.

The present case is quite different. Here we have not the use of the net price in combination with other facts unfavourable to the plaintiff. All that was done was done honestly, regularly, and in the ordinary course of business. The client got the benefit of the jobber's price, whatever it was, and of the broker's judgment in buying for him. The broker charged and got a commission. He did not in fact make a price or make a profit or act as a dealer at all. True he did not state on his bought note how much his commission was, but his bought note was in a form which was plain to the country broker to whom it was rendered. The latter in turn rendered to the client a bought note which stated his own commission as a net commission, and stated in the price paid for the stock a sum which in fact included the London broker's commission. This may be misleading. If so, it is objectionable. In so far as it misleads the client, it may, in some circumstances, estop the broker, but I do not think that without special circumstances (and there are none here) it can estop him from saying the truth, which is that he duly executed his mandate, to act as and incur liability as a broker. After all the question is, what has the broker done? not whether he has correctly reported what he has done. His bought note, which is his report of what he has done, is evidence against him, but in itself it is not conclusive.

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C. A. It is not the reduction into writing of his contract with his client.
1913 He does not lose the whole of his indemnity merely because he
draws up this note incorrectly. So again the London broker's
ASTON bought note to the country broker is not a reduction into writing
v. of the contract between them, unless they have in fact been selling
KELSEY, to and buying from one another. Where in fact, as here, the
Hamilton L.J. London broker has acted as a broker, the bought note is again a
report of what has been done. That the word "net" has no
sinister import in itself is shewn by the case of *Stubbs v. Slater* (1), in the Court of Appeal. There it is true the question
was whether a broker had made a secret profit and could be
ordered to refund part of what he had received, but it became
necessary to consider whether, in a transaction which in itself was
unexceptionable, there was anything improper or even suspicious
in the contract note recording a "net" price, which had been
rendered by the broker, and though *Johnson v. Kearley* (2) was
cited in support of the affirmative, the Court of Appeal decided
that there was not. I am therefore of opinion that Bailhache J.
was in error in thinking that *Johnson v. Kearley* (2) bound him
to decide against the broker on the facts of the present case. It
is authority upon a different set of facts, namely, where the
broker has entered into transactions which are contrary to his
mandate to act as a broker, but does not establish that the effect
of the statement of a "net" price in a bought note must in
law be to deprive the broker of his right to indemnity against
liabilities duly undertaken in pursuance of his mandate. The
appeal must be allowed with costs here and below, and the
judgment below must be set aside and judgment must be entered
for the plaintiff for the amount claimed.

BRAY J. read the following judgment:—This was an action
by a stock and share broker in Bradford to recover money
which he claimed to have paid for and at the request of the
defendant in connection with sales and purchases of stocks and
shares effected by the plaintiff for the defendant on the Glasgow
and London Stock Exchanges. The defendant denied that the
purchases and sales had been made and also pleaded the Gaming

(1) [1910] 1 Ch. 632.

(2) [1908] 2 K. B. 514.

Act. The latter defence failed on the facts, but Bailhache J. decided in the defendant's favour on the first defence. He stated that this was contrary to his own opinion, but he considered himself bound by the decision of this Court in *Johnson v. Kearley*. (1) It was contended for the plaintiff that that case was distinguishable from the present case on the facts, and that is the question we have to consider. Now, the facts as found by Bailhache J. appear in his judgment. I will read them. [His Lordship read the facts as above stated.]

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I must now read the bought notes. I take first a case where the stock was bought through Hughes, a broker on the Glasgow Stock Exchange, who was called as a witness, and I take another case where the stock was bought through Lumsden, a broker on the London Stock Exchange, who was also called. These notes are the ordinary bought notes sent by a broker to his principal signifying that the broker has bought for his principal from a jobber such and such stocks, but instead of stating separately the commission payable by the principal to the broker the commission is included in the price; it says that the price is "net." It was proved that this was usual in dealings with provincial brokers and authorized by the rules of the exchanges. It was not suggested that the use of the word "net" was intended by the London or Glasgow broker to specify that he was selling as a principal to the provincial broker. The contention was that the use of the word "net" had the legal effect of making the contract a contract of sale to the plaintiff. These being the facts, the learned judge proceeds: "The defendant contended that these facts brought the case within the decision of the Court of Appeal in *Johnson v. Kearley*. (1) This necessitates a close consideration of what the decision in that case really is, and I have come to the conclusion that that case goes the length of deciding that when a London broker employed by a country broker to buy shares for a client of the country broker buys in ordinary course from a jobber, but sends to the country broker a bought note in which the purchase price is stated to be 'net,'—that is to say, a price which covers the actual bought price and also the broker's commission, but does not quantify the commission—the

(1) [1908] 2 K. B. 514.

C. A. London broker is, in effect, himself 'making a price' to the country
 1913 broker and is acting as principal and not as broker; and I gather
 from *Johnson v. Kearley* (1) that it is so, though the country
 ASTON stockbroker has in truth and in fact bought as a broker from
 v. the jobber. If that is a correct interpretation of *Johnson v.*
 KELSEY, *Kearley* (1), it governs this case, unless the facts are in principle
 Bray J. distinguishable."

Is this a correct representation of *Johnson v. Kearley* (1)? In my opinion it is not. As I read the judgments of Lord Gorell and Lord Moulton, those learned judges based their decision on three facts which had been found by the learned judge (Bucknill J.) below. The first was the evidence of Mr. Evans, a member of the London firm of brokers. From that evidence Lord Gorell drew the inference that they were selling as principals to the plaintiff. He says (2): "I am very much struck indeed with the statement made in the evidence of Mr. Evans, as it appears in the notes of the evidence, where he is dealing with the concrete case of the Grand Trunk ordinary shares; for he actually says that he added $\frac{1}{16}$ for commission and 'sold' at the price mentioned in his evidence. That is in effect what the London brokers were doing. They were selling at a price and not buying on commission, though the price at which they sold was fixed by what they considered a reasonable profit, depending on their view of how the bargain appeared. The result is that, whereas the defendant employed the plaintiff to buy for her at the market price through London brokers as her agents, the plaintiff has not in fact carried out those instructions, for by arrangement with the London brokers he has allowed them to deal so that they could make a price with the jobber on the one hand and make another price with him on the other, which is not carrying out the transactions in London in such a way that the London brokers acted merely as agents for the country broker." This is certainly not the evidence here. Mr. Lumsden was called and he said that he carried out the business as broker in the ordinary way, and he was not cross-examined. The next fact relied on in *Johnson v. Kearley* (1) was that the London brokers did not charge a fixed rate of commission but a varying charge,

(1) [1908] 2 K. B. 514.

(2) Ibid. at p. 521.

"according to how the bargain appeared." (1) Very great reliance was placed by Lord Moulton on this fact (see the paragraph on the top of p. 528). Now this fact is entirely absent here; Bailhache J. finds that Hughes charged $1\frac{1}{2}d.$ per share and Lumsden $6d.$, both reasonable charges.

The remaining fact relied on was that the London brokers charged the provincial broker a "net" price to include their remuneration. This existed in the present case. It is the one common fact. Now, it must be remembered that the real question here, as in *Johnson v. Kearley* (2), is a question of fact, namely, whether the plaintiff proved that he made contracts or caused contracts to be made on the defendant's behalf on the exchanges or whether he proved contracts of sale to himself by the London brokers. In the former case he is entitled to succeed; in the latter case he fails because he did not act according to the defendant's instructions, he did not carry out the mandate given to him. In *Johnson v. Kearley* (2) the learned judges found that the plaintiff proved contracts of sale to himself. Of the three facts relied on by the learned judges, two of the three, as I have already stated, and not the least important, are absent; only one is present here. Under these circumstances the case, in my opinion, ceases to be an authority which binds us to come to the same conclusion of fact. It is impossible to say how the learned judges would have found the fact if the present case had been before them. Now, does the fact of a net price being charged prove that the brokers on the Glasgow and London Exchanges acted as principals and not as brokers? Bailhache J. expresses his own opinion in this way: "If this case had not been covered by authority, my own opinion would have been in the plaintiff's favour. I should have thought that the method of charging commission adopted by the Glasgow and London brokers was an element to be considered and weighed with the other elements in the case, but not of itself conclusive. This, however, is only to say that my view would have been the same as that of Farwell L.J., the dissenting judge in *Johnson v. Kearley*." (2)

I agree entirely with this opinion. In my opinion, looking at the evidence given here and the documents, I should have no

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(1) See [1908] 2 K. B. at p. 528.

(2) [1908] 2 K. B. 514.

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hesitation in coming to the conclusion that the Glasgow and London brokers acted as brokers only and did not make contracts of sale to the plaintiff. It is clear from the evidence that neither party intended that the contract should be a contract of sale. It is against the rules for a broker to act as a dealer, and the rules authorize a broker when acting as a broker to include his commission in the price and use the word "net." Why is the Court bound to treat this as a contract of sale contrary to the intention of both parties? Can it construe it as a contract of sale when both parties never intended to make such a contract and when the contract note expressly states that it is a contract made by the broker on behalf of the plaintiff with a third person? It is not suggested that there is any estoppel here. Fortunately there is authority on this point. In *Stubbs v. Slater* (1) the Master of the Rolls says (2), "The evidence shews that the word 'net' is really a technical term on the Stock Exchange," and Buckley L.J. says (3), "The accounts which the defendants rendered to the plaintiff have charged him every fortnight a certain sum, (say) 8½d. net. That was a sum which exceeded the amount they were paying to the jobber and was a sum charged to cover both the payment made to the jobber and the services of the brokers in carrying over the shares." Now there is this distinction between that case and the present, that in that case the word "net" appeared in the note rendered by the plaintiff to the defendant. Here it is in the note rendered by the London or Glasgow broker to the plaintiff, but its meaning must be the same, and *Stubbs v. Slater* (1) shews that the use of that word is not inconsistent with the relationship of principal and agent. Every other circumstance and every other document point to the relationship between the plaintiff and the London or Glasgow broker being that of principal and agent and not buyer and seller, and I come to the clear conclusion that that was the real relationship, in which case the plaintiff has fulfilled his mandate and is entitled to succeed. I desire, however, to say that I do not dissent from, indeed I agree with, the observations made by Vaughan Williams L.J., that this practice of charging a price net instead

(1) [1910] 1 Ch. 632.

(2) *Ibid.* at p. 642.

(3) *Ibid.* at p. 643.

of charging the commission separately is an undesirable practice and should be discouraged. The actual amount of commission charged should appear in the bought and sold notes.

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One other point was raised by Mr. Bairstow for the defendant, namely, that the plaintiff was not entitled to charge a double commission, i.e., his own and the London or Glasgow broker's. That point is also a question of fact and was disposed of in the plaintiff's favour by Bailhache J. I agree with his findings and his reasons.

The result is that I think the appeal should be allowed and judgment entered for the plaintiff for the amount claimed.

Appeal allowed.

Solicitors for plaintiff: *Simmons & Simmons, for Barber & Blackburn, Harrogate.*

Solicitors for defendant: *Rawle, Johnstone & Co., for G. F. Stott, Leeds.*

W. J. B.

NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED
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June 9, 10, 12.

[1912 N. 609.]

Principal and Surety—Bank Guarantee—Duty of Bank to Guarantor—Non-disclosure by Bank to Guarantor of Suspicions concerning Conduct of Debtor—Whether Guarantor discharged.

Per Horridge J.: The non-disclosure by a bank to the guarantor of a customer's overdrawn account of facts from which the bank has suspicions that the customer is defrauding him does not discharge the guarantor.

ACTION tried before Horridge J. without a jury. The action was brought by the plaintiffs, the National Provincial Bank of England, Limited, against the defendant, Lord Glanusk, to recover the sum of 3322*l.* 1*s.* 2*d.* on a guarantee given by the defendant to the plaintiffs, dated March 1, 1906, whereby the defendant guaranteed all moneys which might be due to the plaintiffs as bankers on any accounts whatever from one Samuel Hood Cowper Coles.

The only question material to this report was whether certain

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transactions which took place in March, 1907, ought to have been communicated by the plaintiffs to the defendant as guarantor, and whether by reason of their not having been so communicated to the defendant he was discharged from his guarantee. These transactions were that on December 22, 1906, by a letter of that date Coles, who was agent for the defendant of the Glanusk estates, of which the defendant was tenant for life, had opened an account called "capital account," which Powell, the plaintiffs' bank manager, admitted he knew was an estate account. On March 12, 1907, Coles wrote to Powell stating that he had paid out of the capital account with the defendant's approval 1000*l.* to Lloyds Bank, Brecon. This 1000*l.* was paid by a cheque which was drawn in favour of one Morgan, the manager at Brecon of Lloyds Bank, and which, when presented, was in the first instance refused by Powell. Powell gave evidence to the effect that he refused payment of the cheque first because he did not believe in allowing Coles to increase his liabilities in order to pay his debt at another bank, and secondly because it would not in his opinion have been right for Coles to use money from the capital account for his own purposes, and he suspected he was doing this. On March 18, 1907, Powell wrote a letter to Morgan, stating he had a strong suspicion that the cheque was used to pay off some of Coles' liabilities at Lloyds Bank, and that if that was so the information would be of the utmost importance to the plaintiffs, and he also stated in the letter that the cheque was drawn on an account opened for a special purpose and which should not be overdrawn. He gave evidence to the effect that he had no written answer to this letter, but that he thought he was afterwards satisfied by conversation with the Brecon manager as to the application of the 1000*l.*

John Sankey, K.C., and *Eustace Hills*, for the defendant. The defendant was discharged on the principle laid down in *Railton v. Mathews*. (1) The guarantee was not an ordinary guarantee for an overdraft. The relationship between the parties was known to the bank. The defendant trusted Coles, and as that was known to the plaintiffs and they knew or believed that that

(1) (1844) 10 Cl. & F. 934.

confidence was being abused, there was a duty of disclosure upon them. Where there is a continuing guarantee the duty to disclose facts of which knowledge is gained during the guarantee is the same as where knowledge is gained before the guarantee is entered into. [*Hamilton v. Watson* (1) and *London General Omnibus Co. v. Holloway* (2) were also referred to.]

Holman Gregory, K.C., and *Hon. M. M. Macnaghten*, for the plaintiffs. There is no authority for the proposition that it is the duty of a bank to give notice to the guarantor of an account, of any conduct on the part of the person whose account is guaranteed which adds to the risk of the guarantor: *Wythes v. Labouchere*. (3)

In a fidelity guarantee the trustworthiness of the servant is the basis of the contract: *Phillips v. Foxall*. (4) But that principle does not apply to an ordinary bank guarantee. Nor does it come within the class of contracts *uberrimæ fidei*: *Davies v. London and Provincial Marine Insurance Co.* (5); *Seaton v. Burnand*. (6) The present case is covered by the decision in *Bank of Scotland v. Morrison*. (7)

Eustace Hills, in reply, as to the cases cited on behalf of the plaintiffs. The ground of the decisions in *Wythes v. Labouchere* (3) and *Bank of Scotland v. Morrison* (7) was that there is no obligation on a bank to disclose facts affecting the credit of a customer. But there is a duty to disclose facts affecting his honesty. In *Bank of Scotland v. Morrison* (7) there was no dishonesty on the part of the customer towards the guarantor. The dishonesty of the debtor was independent of the guarantor. The moment a bank has knowledge of dishonesty as between the debtor and the surety, the obligation exists on the part of the bank to disclose it to the surety.

Cur. adv. vult.

June 12. The following judgment was read by

HORRIDGE J., who, after stating the facts, continued I think that Powell, the bank manager, was not considering

(1) (1845) 12 Cl. & F. 109.

(4) (1872) L. R. 7 Q. B. 666.

(2) [1912] 2 K. B. 72.

(5) (1878) 8 Ch. D. 469.

(3) (1859) 3 De G. & J. 593.

(6) [1899] 1 Q. B. 782.

(7) 1911 S. C. 593.

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the question whether Coles was wrongly using the defendant's money, as he had been informed that the defendant knew of the cheque, but was suspicious that Coles was paying the debt to another bank by increasing his overdraft with the plaintiffs. In any case I do not think there was anything which ought to have conveyed to his mind that Coles was acting dishonestly towards the defendant, and I see no reason to doubt the fact that he was satisfied by the Brecon manager on the question he had written about.

It was contended before me that on the principle of the cases dealing with fidelity guarantees, such as *Railton v. Mathews* (1), the bank ought to have informed the defendant of any facts which might indicate that his agent was behaving improperly towards him, but I do not think the principle of these cases applies to a bank guarantee. See *London General Omnibus Co. v. Holloway* (2) and the judgments of Farwell L.J. at p. 82 and Kennedy L.J. at p. 85 of the report in the *Law Reports*. The obligation of a bank upon a bank guarantee is laid down by Lord Campbell in *Hamilton v. Watson* (3), and the criterion there suggested is whether there is anything which might not commonly be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might commonly expect.

Here there clearly was no contract between the plaintiffs and Coles altering the position that Coles, according to his own evidence, opened accounts for his own convenience, all which accounts were, in my view, covered by the guarantee of the defendant. In the case of *Wythes v. Labouchere* (4) Lord Chelmsford L.C. says with regard to a guarantee other than a guarantee of fidelity that a creditor is under no obligation to inform an intended surety of matters affecting the credit of the debtor or of any circumstances connected with the transaction in which he is about to engage which will render the position more hazardous.

(1) 10 Cl. & F. 934.

(2) [1912] 2 K. B. 72.

(3) 12 Cl. & F. 109.

(4) 3 De G. & J. 593.

In *Davies v. London and Provincial Marine Insurance Co.* (1) Fry J. says: "It has been argued here that the contract between the surety and the creditor, is one of those contracts which I have spoken of as being *uberrimæ fidei*, and it has been said that such a contract can only be upheld in the case of there being the fullest disclosure by the intending creditor. I do not think that that proposition is sound in law. I think that, on the contrary, that contract is one in which there is no universal obligation to make disclosure." The nearest case to the present one is the Scotch case of *Bank of Scotland v. Morrison* (2), in which the Lord Justice-Clerk says: "But further, I am unable to find in the authorities any ground for holding that the fact that suspicious circumstances come to the knowledge of a creditor, and are not communicated at once to the cautioner, is a ground for holding the cautioner freed from his obligation. The defender founded on numerous cases, but these were practically cases of fidelity guarantees, and between such cases and those of caution to a creditor for debt there is a marked and obvious distinction"; and Lord Salvesen says (3): "On a review of the decisions cited, it appears, therefore, that there is no authority for the view that it is the duty of a bank, whenever it becomes aware of any circumstances seriously affecting the credit of a customer, to communicate at once with any of that customer's friends who may have signed cash credits on his behalf or guarantees for his pecuniary obligations." I do not think on the authorities there was any duty on the plaintiffs to communicate to the defendant the fact, if it was a fact, that they were suspicious that Coles was defrauding him, nor do I think that upon the facts there is any satisfactory proof that the plaintiffs were so suspicious.

I was not supplied on behalf of the defendant with evidence as to whether or not there was any alteration in the balance due on the total accounts in March, 1907, and the time when the defendant was called upon to make good his guarantee, but I was told that if it was held that the plaintiffs ought to have communicated to the defendant the facts I have mentioned, and that by

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(1) 8 Ch. D. 469, at p. 475. (2) 1911 S. C. 593, at p. 602.
(3) 1911 S. C. 593, at p. 605.

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their not doing so he was released from his guarantee, the amount due at that period could easily be ascertained.

I give judgment for the plaintiffs for 3322*l.* 1*s.* 2*d.* and interest, amounting together to 3348*l.* 9*s.*, and costs.

Judgment accordingly.

Solicitors for plaintiffs: *Wilde, Moore, Wigston & Co.*

Solicitors for defendant: *Lee & Pembertons.*

J. E. A.

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 May 20, 26.

WHITE AND WIFE v. STEADMAN.

[1913 W. 323.]

Negligence—Breach of Duty—Horse and Carriage hired by Husband—Vicious Horse—Injury to Wife—Dangerous Animal—Knowledge of Owner of Horse—Means of Knowledge—Control of Carriage—Acceptance of Wife as Passenger.

The male plaintiff hired from the defendant, who was a livery stable keeper, a landau with a horse and driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse shewed considerable signs of restiveness when meeting motor cars, and when passing a traction engine shied and became unmanageable, and the carriage was upset and both husband and wife were injured. In an action by the husband and wife to recover damages for the injuries the jury found that the defendant ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. The defendant upon these findings, while admitting liability to the husband, contended that he was not liable to the wife:—

Held, that, as the defendant ought to have known of the vicious propensity of the horse, he was in the same position as if he had known, and that therefore it was his duty to the wife, who he must have contemplated would use the carriage, to warn her of the dangerous character of the horse; that this duty arose independently of contract; and that therefore the defendant was liable to the wife.

Held, also, that the defendant was liable to the wife upon the ground that, as he kept control of the carriage and accepted her as a passenger therein, he was under a duty to use reasonable care to carry her safely and for that purpose to provide a proper horse.

FURTHER CONSIDERATION.

The action was brought to recover damages for injuries to the

plaintiffs owing to the alleged negligence and breach of duty on the part of the defendant.

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The plaintiffs were husband and wife residing at Doncaster. On September 5, 1912, the male plaintiff hired from the defendant, who was a livery stable keeper at Doncaster, for reward a landau with a horse and coachman for the purpose of taking an afternoon drive in the country. The female plaintiff accompanied him on the drive. During the drive they met some motor cars, when the horse shewed considerable signs of restiveness. On the way home they overtook a traction engine, when the horse again became restive, and the male plaintiff asked the coachman to get some one to lead the horse past. The coachman, thinking that he could pass safely, did not do so, and when they were passing the traction engine the horse shied and got out of control and the carriage was upset, and both the plaintiffs were injured.

The plaintiffs in the statement of claim alleged that it was an implied term of the contract that the male plaintiff should be accompanied in the landau by his wife, and that the horse should be quiet in harness and reasonably fit for the purpose, and that the landau should be carefully and skilfully driven. Alternatively, that the defendant owed a duty to the plaintiffs, whom he had invited ^{and}/_{or} received into his landau, to provide a horse which was quiet in harness and reasonably fit for the purpose and to drive the landau carefully and skilfully. That in breach of the said contract ^{and}/_{or} duty the horse which the defendant provided was not quiet in harness and was not reasonably fit for the purpose, and the horse and landau were not carefully or skilfully driven but were negligently driven by the defendant's servant.

At the trial at Leeds Lush J. left certain questions to the jury, which with the answers were as follows: (1.) Did the defendant know or ought he to have known if he had used proper care that the horse was not safe at the time the landau was let out to Mr. White? Answer, Yes. (2.) Was the driver negligent in managing the horse? Answer, he was not negligent, but it would have been better if he had asked the flagman to lead the horse past the traction engine. The damages were assessed at

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Upon these findings it was admitted that the male plaintiff was entitled to judgment, and the question as to the female plaintiff's right to recover was reserved for further consideration. (1)

H. T. Waddy, for the plaintiffs. The defendant must have contemplated that the female plaintiff would or might go out for a drive in the carriage with her husband, and by his servant he accepted her as a passenger in the carriage, and it therefore became his duty towards her to take reasonable care that the carriage and horse were fit for the purpose. That duty arises independently of contract. It arises from the fact that the defendant retained the control of the horse and carriage. It is similar to the duty of a railway company to take reasonable care to carry safely a person whom they receive as a passenger, and that duty does not depend upon contract: *Marshall v. York, Newcastle, and Berwick Ry. Co.* (2); *Austin v. Great Western Ry. Co.* (3) The principle of those decisions is applicable to this case. In *Elliott v. Hall* (4) a colliery owner consigned coals to a buyer by rail in a truck which he had on hire from a waggon company. Through the negligence of the colliery owner's servants the truck was allowed to leave the colliery in a defective state, and in consequence one of the buyer's servants, who was employed to unload the coal from the truck, was injured. The colliery owner was held liable to the buyer's servant inasmuch as it must have been contemplated that the buyer's servants would unload the truck. As *Lush J.* pointed out in *Blacker v. Lake & Elliot* (5), the duty in *Elliott v. Hall* (4) arose from the fact that the colliery owner had the dominion or control over the truck.

(1) In the argument on further consideration it was assumed that the finding of the jury in answer to the first question could only be treated as a finding that the defendant ought to have known if he had used proper care that the horse was

not safe at the time the landau was let out to Mr. White (the male plaintiff), and not as a finding that the defendant knew.

(2) (1851) 11 C. B. 655.

(3) (1867) L. R. 2 Q. B. 442.

(4) (1885) 15 Q. B. D. 315.

(5) (1912) 106 L. T. 533, at p. 541.

Shrimpton v. Hertfordshire County Council (1) is an authority for the proposition that the driver of the carriage had authority to accept the female plaintiff as a passenger in the carriage, and that it therefore became the duty of the defendant towards her to take reasonable care to provide a safe horse and carriage. There is no distinction in principle between negligence in driving the carriage and negligence in not providing a proper horse. The decision in *Earl v. Lubbock* (2) does not conflict with this view. There the defendant had contracted to keep certain vans in repair, and the plaintiff, who was a driver in the employment of the owner of the vans, was injured by the wheel of a van which he was driving coming off. It was held that the defendant was under no duty to the plaintiff. There, however, the defendant had no control or dominion over the van, and so no question of invitation by him to the plaintiff to use the van arose. Nor is *Cavalier v. Pope* (3) an authority in favour of the defendant. In that case the defendant had let a house to a tenant and had therefore parted with the possession and control of it, and he was held not liable to the tenant's wife for an accident to her caused by the defective condition of the floor, though he had agreed with the tenant to repair it. There again there was no question of an invitation by the defendant to the tenant's wife to use the premises. In the present case the defendant invited the female plaintiff to drive in the carriage with a horse which he ought to have known was dangerous. The carriage was thus in the nature of a trap. Both the plaintiffs are therefore entitled to judgment.

[LUSH J. In *Blacker v. Lake & Elliot* (4) I said that, if a person hands over an article of a dangerous nature which he knows to be dangerous to somebody else who is ignorant of its true nature, it is his duty to warn him of its character, and if he does not do so he commits a breach of duty not only to the person who contracts with him, but also to all persons who to his knowledge may use it. Does that duty extend to a case where the defendant did not know that the horse was dangerous, but where he ought, if he had taken proper care, to have known?]

(1) (1911) 104 L. T. 145.

(3) [1905] 2 K. B. 757; [1906]

(2) [1905] 1 K. B. 253.

A. C. 428.

(4) 106 L. T. 533, at p. 540.

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The duty probably extends to such a case, but it is sufficient in this case to contend that the defendant is liable on the ground stated above.

Tindal Atkinson, K.C., and *J. F. Hedley*, for the defendant. Upon the finding of the jury that the defendant ought to have known that the horse was not safe, the female plaintiff is not entitled to judgment. The jury have not found that the defendant knew that the horse was not safe. It is a mere finding of negligence. In the railway cases, such as *Austin v. Great Western Ry. Co.* (1) and *Foulkes v. Metropolitan District Ry. Co.* (2), the duty to take reasonable care to carry safely arose either from a contract to carry the plaintiff or from the acceptance of him as a passenger. A railway company's servants are persons who are authorized to accept passengers. Once it is proved that a person is accepted as a passenger by the authorized servants of a railway company, the duty arises to take reasonable care to carry that person safely. There was no contract here with the female plaintiff. Nor was there any invitation by the defendant to her to accompany her husband in the carriage. The carriage was let to the husband, and he was the only person who could invite any one to drive in it. He could invite any one he chose. The defendant had no right to invite any person to accompany the male plaintiff in the carriage, nor did he accept the female plaintiff as a passenger in the carriage. The driver of the carriage was not authorized to accept passengers in the carriage. In *Shrimpton v. Hertfordshire County Council* (3) the defendants consented to the plaintiff, a child, being conveyed in the vehicle from the school, and therefore invited the child to become a passenger in it. There is no authority to shew that such a duty extends, in a case like the present, to a person who may possibly or even probably use the carriage. In *Elliott v. Hall* (4) the Court based their judgment on the fact that it was contemplated that the truck would necessarily be unloaded by the purchaser's servants, of whom the plaintiff was one. If the carriage had been hired out by the defendant expressly to take both the husband and wife for a drive, then the decision in *Elliott v. Hall* (4) might

(1) L. R. 2 Q. B. 442.

(3) 104 L. T. 145.

(2) (1880) 5 C. P. D. 157.

(4) 15 Q. B. D. 315.

apply. There is no finding to that effect here. Nor was the horse, on account of its propensity, an animal dangerous in itself; it was merely unsafe to drive in a carriage when meeting a traction engine. But even if it was, by reason of its vicious propensity, of a dangerous nature, the defendant is not liable unless he knew that it was dangerous: *Heaven v. Pender* (1); *Earl v. Lubbock*. (2) This view is supported by the observations of Lush J. in *Blacker v. Lake & Elliot*. (3) The defendant is therefore not liable to the female plaintiff.

[LUSH J. referred to *Meux v. Great Eastern Ry. Co.* (4)]

Waddy in reply. Knowledge of the dangerous character of the horse is not necessary. The duty to know is the same as knowledge, otherwise a man might neglect to make proper inquiries. Nor is it necessary that the defendant should know that the female plaintiff would necessarily use the carriage. She was accepted as a passenger by the defendant's driver.

Cur. adv. vult.

May 26. LUSH J. read the following judgment:—The facts of this case are shortly as follows. Mr. White, one of the plaintiffs, hired a landau from the defendant, who is a livery stable keeper, for the purpose of taking a drive from Doncaster into the country. The other plaintiff, Mrs. White, was one of the party. Mr. White had often hired carriages from the defendant before. The defendant provided the driver as well as the horse and landau. During the journey they passed or met one or two motors. The horse shewed considerable signs of restiveness, but nothing happened until they were on the way home. Coming home they overtook a traction engine. The horse again became restive, and as they neared the traction engine the plaintiffs became so alarmed that Mr. White asked the coachman to get some one to lead the horse past. Thinking that he could pass safely, he did not do so. As they got up to the traction engine the horse got out of control and shied, and the carriage was upset. Mr. and Mrs. White were both injured. They brought

(1) (1883) 11 Q. B. D. 503, at p. 517. (2) [1905] 1 K. B. 253, at p. 258.

(3) 106 L. T. 533, at pp. 540, 541.

(4) [1895] 2 Q. B. 387.

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this action for damages for negligence and breach of duty. At the trial the plaintiffs contended, first, that the horse was known by the defendant and his servants to be an unsafe horse to be sent out with a landau owing to its propensity to shy and get out of control, especially when meeting motors; and, secondly, that the driver was negligent in the management of the horse, especially in failing to stop when asked to do so.

The jury found that the driver was not negligent, but added this rider: "It would have been better if he (the driver) had asked the flagman to lead the horse past the traction engine." Mr. Waddy contended that this finding was in reality a finding of negligence. I do not agree with this contention. I think that all that the finding and the rider together mean is this, that the failure to stop and have the horse led, though unwise, was not a negligent act. Mr. Waddy had invited the jury to say that it was, and they added their rider, as it seems to me, to shew that they regarded the failure to stop only as a mistake and nothing more. To make a mistake is not necessarily negligence. That the jury intended only to find that there was a mistake not amounting to negligence is clear, not only from the finding itself but from what they said in answer to a question which I asked when the verdict was given. Whether the finding was satisfactory, having regard to the character of the horse, is not a question for me. The finding of the jury with regard to the second contention was that "the defendant knew, or ought to have known if he had used proper care, that the horse was not safe at the time the landau was let out to Mr. White." It is not disputed that Mr. White, who was a party to the contract of hiring, is entitled on this finding to judgment for the amount assessed by the jury, but Mr. Tindal Atkinson for the defendant contended that, as Mrs. White was not a party to the contract, the defendant owed no duty to her, and that the finding disclosed no liability towards her. Whether that is a correct contention is the question that I have to decide.

Now I agree that I can only treat the finding as amounting to this: that the defendant ought to have known, if he had used proper care, that the horse was unsafe to send out with the landau. It might perhaps have been better if I had left the question as to

actual knowledge as a separate question, but I was not asked to do so, and the view I took at the trial was this, that a person who sends out a carriage with a horse which is unsafe in fact, when he has the means of knowledge as to the horse's true character, and does not take the ordinary means—the means which an ordinary prudent person would take—to ascertain it, is in the same position as regards his duty towards third persons as if he knew. Mr. Tindal Atkinson has contended that this view is wrong, and that at all events nothing short of actual knowledge imposes a duty towards persons who do not stand in any contractual relation towards the alleged wrong-doer. In order to see if this contention is sound, I will consider first whether actual knowledge that a horse or chattel is unsafe imposes any duty on the lender towards persons who are strangers to the contract.

Now it is clear in my opinion, and it required no finding from the jury to establish it, that the plaintiff Mrs. White was one of the class of persons who the defendant must be taken to have contemplated would or might use the carriage. The defendant, through his authorized servant, accepted her as one of those to be carried, and it is plain beyond question that the carriage was provided for her use, if she chose to use it, as well as that of her husband.

The next fact to be mentioned is that a horse of known vicious propensity is, as Willes J. said in *Cox v. Burbidge* (1), within the class of "dangerous animals," and the duty of a person who lets it out is the same as that which any person is under who allows others to use or come in contact with an animal or chattel that is dangerous in itself, i.e., of a dangerous character as distinguished (as regards a chattel) from a danger only arising from defective manufacture or repair. He is under a duty to warn not only the person who hires it, but any person who he knows or contemplates or ought to contemplate will use it. The duty is not dependent on and is not created by the contract. It exists independently of contract. That which creates it is not the contract, but the supplying of a dangerous animal or chattel for the use of another person.

The duty is therefore owed not only to the person who contracts

(1) (1863) 13 C. B. (N.S.) 430, at pp. 439, 441.

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to hire it, but to all those persons for whose use it is supplied. Such a duty has often been recognized. It was recognized and stated in *Cavalier v. Pope* by Collins M.R. in the Court of Appeal (1) and by Lord Atkinson in the House of Lords. (2) It was, I think, recognized in *Clarke v. Army and Navy Co-operative Society*. (3) The cases which were cited to me of *Earl v. Lubbock* (4) and *Cavalier v. Pope* (5) have no bearing on the principle referred to. Those were not cases in which a chattel known to be dangerous, or a chattel which was of a dangerous character, was supplied for the use of the plaintiff. They were cases in which the only duty that was or could be alleged was to take reasonable care in repairing a van in the one case and a house in the other, and as that duty depended entirely on contract, it was held that strangers to the contract had no right of action. If, therefore, the defendant had known of the vicious propensity of the horse in this case, I think it is clear that Mrs. White could have recovered. But it is said that the defendant, who through his own carelessness did not use the means of knowledge at his disposal, is in a better position than he would have been had he used them and made himself acquainted with the true facts.

In my opinion this view is not correct. I think that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows. A person who keeps for hire horses, some of which he knows may be dangerous, cannot shelter himself behind his own want of knowledge, if that arises from his indifference or carelessness. If he has the means of knowledge and shuts his eyes to them, he does not thereby diminish or alter his duty towards those to whom he supplies a horse which is dangerous in fact. This has, I think, been decided more than once. In *Clarke v. Army and Navy Co-operative Society* (6) Mathew L.J. spoke of the means of knowledge as being identical with knowledge. In

(1) [1905] 2 K. B. 757, at pp. 761, 762.

(2) [1906] A. C. 428, at p. 433.

(3) [1903] 1 K. B. 155.

(4) [1905] 1 K. B. 253.

(5) [1905] 2 K. B. 757; [1906] A. C. 428.

(6) [1903] 1 K. B. 155, at p. 168.

Dominion Natural Gas Co. v. Collins (1) Lord Dunedin cited as good law the case of *Thomas v. Winchester* (2), where it was held that a person who sent out a dangerous compound, the dangerous character of which he did not know, but would have known if he had used reasonable care, was as liable to third persons as if he had known.

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In my view the decision in the much discussed case of *George v. Skivington* (3) would, as I suggested in my judgment in *Blacker v. Lake & Elliot* (4), have been in accordance with the authorities if it had been put on this ground. It has been disapproved, as the Court held in that case, in so far as it lays down or appears to lay down the principle that negligence in manufacturing an article gives a cause of action to a person who is not a party to the contract, but that is all. As I have pointed out, a duty to warn those who a manufacturer knows or contemplates will use a chattel which is dangerous in fact does not arise from contract.

For these reasons I think that the defendant on the facts found by the jury was under a duty to the plaintiff Mrs. White, and inasmuch as she has been injured through his breach of that duty she is, in my opinion, entitled to judgment.

I ought to add that the case may, I think, be put also on the other ground, which is the main ground that Mr. Waddy took in his argument. The defendant, who kept control of the carriage, accepted the female plaintiff as a traveller or passenger. He was therefore bound to use due care to see that she was safely carried. He failed, as the jury found, to do so, because he failed to take proper care to see that a safe horse was provided. In support of this contention Mr. Waddy cited *Elliott v. Hall*. (5) There a defective truck was provided by the defendant, who knew that the plaintiff would use it, and, being so used while under the defendant's control, he was held liable to the plaintiff, who was injured through the defect, although there was no contract between him and the defendant. I do not think that it matters that the plaintiff in that case was a person who would necessarily to the defendant's knowledge use the truck. The duty lies

(1) [1909] A. C. 640, at p. 646.

(3) (1869) L. R. 5 Ex. 1.

(2) (1852) 6 N. Y. Rep. 397.

(4) 106 L. T. 533, at p. 541.

(5) 15 Q. B. D. 315.

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towards the persons or class of persons who the owner must be taken to contemplate may use the dangerous chattel or towards persons who are permitted or invited to use it by the owner or his authorized agent. The female plaintiff here was invited to use the carriage or permitted to use it by the defendant's authorized servant, and the defendant must be taken to have contemplated that she would do so. The truck there and the carriage here were under the defendant's control, and I cannot see that there is any difference in principle between the two cases. The principle is very analogous to that which was laid down in *Taylor v. Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) and *Meux v. Great Eastern Ry. Co.* (2), where it was said that the absence of a contract was immaterial, and that the only importance of it, if there was one, was that it supplied evidence that the plaintiff was lawfully on the premises of the defendants.

In the result, therefore, I hold that both the plaintiffs are entitled to judgment, and I give judgment for Mr. White for 151*l.* 13*s.* 8*d.* and for Mrs. White for 200*l.*

Judgment for plaintiffs.

Solicitors for plaintiffs: *Long & Gardiner, for A. Blackmore, Doncaster.*

Solicitors for defendant: *Bell & Sugden.*

(1) [1895] 1 Q. B. 134.

(2) [1895] 2 Q. B. 387.

W. F. B.

BATES AND ANOTHER v. BATEY & CO., LIMITED.

1913

June 14, 16,
25.

[1912 B. 2819.]

Negligence—Dangerous Article—Sale by Manufacturer to Shopkeeper—Purchase by Plaintiff from Shopkeeper—Defect unknown to Manufacturer—Means of Knowledge—Injury to Plaintiff—Liability of Manufacturer.

The defendants manufactured ginger beer which they placed in bottles bought from another firm; they sold the bottled ginger beer to a shopkeeper from whom the plaintiff bought one bottle; owing to a defect in the bottle it burst when the plaintiff was opening it and injured him; the defendants did not know of the defect, but could have discovered it by the exercise of reasonable care:—

Held, that the defendants were not liable inasmuch as they did not know of the defect, although they could have discovered it by the exercise of reasonable care.

White v. Steadman, ante, p. 340, distinguished.

FURTHER CONSIDERATION of an action tried before Horridge J. with a jury.

The plaintiffs claimed damages in respect of personal injuries sustained by the infant plaintiff owing to the negligence of the defendants. The plaintiff J. W. Bates was an infant twelve years of age, and the other plaintiff was his father. The infant plaintiff purchased at a retail shop a bottle of ginger beer, which had been manufactured and bottled by the defendants in a bottle purchased from another firm and sold by the defendants to the shopkeeper. The bottle burst while the infant plaintiff was endeavouring to open it, and so seriously injured him that he lost the sight of one eye. The father in consequence incurred expenses which were agreed to amount to 30*l*.

The plaintiffs alleged that the injury was caused by the negligence of the defendants in that it was their duty to take care that the bottle of ginger beer sent out by them for sale should be fit and proper and safe to be handled by a person opening it, and that they had sent the bottle out in such a defective condition that it was not strong enough for its purpose.

The jury found (1.) that there was a defect in the bottle, which defect caused the accident; (2.) that the defect was not a

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latent defect which could not have been discovered by the exercise of reasonable care and skill; and (3.) that the defect was owing to the negligence of the defendants. The damages for the injury to the boy were assessed at 275*l*.

It was agreed that, upon further consideration, the learned judge should draw any further inferences of fact. He held that a bottle of ginger beer was not in itself a dangerous thing, and that, even if it was, the shopkeeper must have known that it was a dangerous thing; that the bottle of ginger beer, inasmuch as the bottle was defective, was a dangerous thing; but that the defendants did not know of the defect although by the exercise of reasonable care they could have discovered it.

J. D. Cassels and *L. O'Malley*, for the plaintiffs.

P. Hastings, for the defendants.

The arguments appear fully in the judgment.

Cur. adv. vult.

June 25. (1) HORRIDGE J. In this case the plaintiff, a boy of twelve years of age, purchased on May 19, 1912, a bottle of ginger beer from a local shopkeeper, called Wallis, at Barnes, who in his turn had purchased it from the defendants, who are ginger beer and mineral water manufacturers. After taking the bottle home, in endeavouring to open it, it burst, and unfortunately it caused the boy such damage that he lost his right eye. The action is brought by the infant plaintiff against the defendants in respect of his personal injuries and by his father in respect of certain out of pocket expenses, which are agreed by counsel at 30*l*.

In answer to questions which I left to the jury they found: 1. That there was a defect in the bottle, which defect caused the accident. 2. That the defect was not a latent defect which could not have been discovered by the exercise of reasonable care and skill. 3. That the defect was owing to the negligence of the defendants; and they assessed the damages for personal injuries to the boy at 275*l*. It was agreed by counsel that, if necessary, I should draw any further inferences of fact.

(1) The judgment was written.

The bottle was purchased by the defendants from a firm of Rylands & Co., and the negligence alleged against the defendants was that they ought to have seen before filling the bottle with ginger beer and sending it out that it was defective in several respects. On behalf of the plaintiffs it was contended before me that either the bottle of ginger beer was in itself a dangerous thing, or that this particular bottle of ginger beer, with its defective bottle, was a dangerous thing.

It seems clear from the judgment of Hamilton J. in *Blacker v. Lake* (1) that the question of whether the ginger beer bottle belonged to a class of articles which were dangerous in themselves, or dangerous from a defect in the particular thing, is a question for the judge. In my judgment a bottle of ginger beer is not in itself a dangerous thing, and further, if it be so, it was a thing which Wallis, who purchased from the defendants, must equally have known to be a dangerous thing, as he would be fully acquainted with the explosive quality of ginger beer, and therefore there was no duty to warn him: see the judgment of Lord Atkinson in *Cavalier v. Pope* (2), where he says: "It is, I think, clear that the case does not come within the principle of *Indermaur v. Dames* (3) and the cases which followed it down to *Earl v. Lubbock* (4), because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk, he has no cause of action." And Hamilton J. in *Blacker v. Lake* (5) says: "There is no obligation to warn a person who is aware of the danger."

The further question, however, remains as to whether or not, inasmuch as this ginger beer was in a defective bottle, the bottle of ginger beer was a dangerous thing. In my judgment it was. It was not contended before me that the defendants knew at the time when they sold the bottle of ginger beer that the bottle was so defective, and I certainly, if necessary, should find as a fact that they did not so know. It was, however, contended that if

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(1) (1912) 106 L. T. 533.

(3) (1866) L. R. 1 C. P. 274.

(2) [1906] A. C. 428, 432.

(4) [1905] 1 K. B. 253.

(5) 106 L. T. 533, 537.

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they had the means of knowledge they were as much responsible as if they had known; and I think the verdict of the jury must be taken to mean that the defendants did not take proper means to inform themselves as to whether or not the bottle was a safe bottle.

The law on this question is to be found in the judgment of Parke B. in *Longmeid v. Holliday* (1), where he says: "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that if a machine, not in its nature dangerous, a carriage for instance, but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it." This passage is quoted with approval by Collins M.R. in the case of *Earl v. Lubbock*. (2) In the same case Stirling L.J. (3), after quoting a passage from the judgment of Cotton and Bowen L.JJ. in *Heaven v. Pender* (4), to the effect "that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act," goes on to say with regard to these words: "As to the first part of that proposition, with regard to a dangerous instrument, I take it that the reference is to a thing dangerous in itself, and that is shewn by the illustration that is given, and also by what is stated in the second part of the proposition which treats of an instrument or thing in such a condition as to cause danger, not necessarily incident to its use. I think, therefore, that the van which the plaintiff was driving does not fall within the first branch of the sentence that I have quoted, and that to succeed the plaintiff must bring the case within the second part. In that case he must adduce evidence to shew that to the knowledge of the defendant

(1) (1851) 6 Ex. 761, 768.

(2) [1905] 1 K. B. 253, 257.

(3) *Ibid.* at p. 258.

(4) (1883) 11 Q. B. D. 503, 517.

the van was in such a condition as to cause danger, not necessarily incident to its use. It appears to me that the plaintiff was not in a position to do this, and consequently he failed in establishing the liability of the defendant."

The negligence there alleged was a failure to properly inspect the wheel and to report its defective condition. If, however, the failure to obtain knowledge which could by reasonable care have been obtained is equivalent to knowledge, it seems to me the Court of Appeal would have sent that case down to the county court judge to be heard by him on the question of whether or not the defendant must be taken to have knowledge because he failed to make proper use of the means of discovery at his disposal; and I think this case is a direct decision of the Court of Appeal, following *Longmeid v. Holliday* (1), that even where the defect is discoverable by the exercise of ordinary care the defendant is not liable, apart from contract, unless he in fact had actual knowledge.

My greatest difficulty has been that, in *White v. Steadman* (2), Lush J. held, in the case of a vicious horse, that a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows. I do not think that Lush J. in that case can have intended to decide that, where a thing not dangerous in itself becomes dangerous through a defect occasioned by breach of contract in its manufacture or delivery, the person handing it over must be held liable to a third party because, although he did not know, he might by the exercise of reasonable care have known its condition. I think this must be so because he was a party to the decision of *Blacker v. Lake* (3), and I find that in that case Hamilton J. lays down this proposition: "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe and had no reason to believe that it was not so, in the sense that no one had drawn their attention to the fact, but that had they been wiser men or

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(1) 6 Ex. 761.

(2) Ante, p. 340.

(3) 106 L. T. 533, 537.

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more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known."

In any case the decision in *White v. Steadman* (1) was not a decision with regard to a defect arising from breach of contract, but had reference to a vicious horse. I express no opinion with regard to that decision, but I think that the judgment of Parke B. in *Longmeid v. Holliday* (2), of Cotton and Bowen L.JJ. in *Heaven v. Pender* (3), of Stirling L.J. in *Earl v. Lubbock* (4), and of Hamilton J. in *Blacker v. Lake* (5) make it clear that in this case the plaintiff is not entitled to recover. I have not felt myself bound by *George v. Skivington* (6), as that case was not followed by Hamilton and Lush JJ. in *Blacker v. Lake*. (5)

I give judgment for the defendants.

Judgment for defendants.

Solicitor for plaintiffs: *O. L. Richardson.*

Solicitors for defendants: *William Easton & Sons.*

(1) Ante, p. 340.

(2) 6 Ex. 761.

(3) 11 Q. B. D. 503.

(4) [1905] 1 K. B. 253.

(5) 106 L. T. 533, 537.

(6) (1869) L. R. 5 Ex. 1.

J. H. W.

UNITED STATES STEEL PRODUCTS COMPANY v.
GREAT WESTERN RAILWAY COMPANY.

1913

May 22 ;
July 2.

[1911 U. 243.]

Railway—Carriage of Goods—Condition in Consignment Note—Goods received and held by Railway Company “subject to general lien for any . . . moneys due to them from the owners of such goods upon any account”—Construction of Condition.

The plaintiffs, who were the vendors of goods, authorized their agents to deliver the goods to the defendants, the Great Western Railway Company, for carriage to the buyers upon the terms of a consignment note which contained the following condition :—“ All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account ; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses.”

The plaintiffs' agents accordingly delivered the goods to the defendants. The plaintiffs had paid all freight and charges in respect of the carriage of the goods. While the goods were still in possession of the defendants as carriers, the plaintiffs heard of the insolvency of the buyers and, by their agents, gave notice of stoppage in transitu to the defendants. The buyers were indebted to the defendants in the sum of 1170*l.*, which did not include any freight or other charges in respect of the goods. The defendants claimed that under the condition in the consignment note they had a lien as against the plaintiffs in respect of the 1170*l.* due from the buyers :—

Held that, although its words were wide enough to extend considerably further, the condition ought to be read as meaning that the carrier should not be bound to deliver the goods to the consignee until the consignee had discharged any debt due in respect of all goods which had been carried for him by the carrier. It was not necessary that it should be read as meaning that the carrier should be entitled to a lien as against persons who had nothing to do with the debt. The defendants were therefore not entitled to hold the goods as against the plaintiffs.

ACTION tried in the Commercial Court before Pickford J. without a jury.

The action was brought by the plaintiffs, a corporation existing

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under the laws of the State of New Jersey, United States of America, whose place of business in the United Kingdom was at New Broad Street, London, against the defendants to recover damages for detainue and/or conversion of the plaintiffs' goods, namely, 387 tons 3 cwt. 7 lbs. of steel billets. The billets in question were part of 1500 tons sold by the plaintiffs to Messrs. Tupper & Co., Limited, of Batman's Hill Works, Bilston, Staffordshire, on the terms of a contract dated December 29, 1910, which was in substance a c.i.f. contract. In part performance of the contract 500 tons of billets were shipped by the plaintiffs in the steamship *Manchester Shipper* from Philadelphia, U.S.A., to Messrs. Tupper & Co., Limited, at Bilston under a through bill of lading dated February 28, 1911, and made between the plaintiffs and Manchester Liners, Limited, the owners of the *Manchester Shipper*, and the freight to Tupper & Co.'s works at Bilston under the bill of lading was prepaid by the plaintiffs. The bill of lading provided that the goods were to be carried to Manchester and there delivered from the ship's deck to order. Upon the bill of lading were the words "Notify Tupper & Co. Goods to be forwarded to Batman's Hill Works, Bilston Eng., via Great Western Railway from Manchester and the carrier is authorized by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier."

Clause 10 of the bill of lading was as follows: "Goods destined to ports or places other than the ship's port of discharge are to be forwarded thence at the risk of their owners, and shall be subject exclusively to the conditions of the carriers who may complete the transit."

The *Manchester Shipper* with the billets on board arrived in the port of Manchester on or about March 10, 1911, and thereupon in pursuance of the authority given by the bill of lading R. J. Darlington, the representative of Manchester Liners, Limited, signed the Manchester Ship Canal Company's consignment note for goods to be carried at reduced rates at owner's risk, which (so far as material) was as follows:—

“ Manchester Ship Canal Company.

“ Consignment note for goods to be carried at reduced rates at owner's risk.

“ To the Manchester Ship Canal Company.

“ Manchester Docks

“ March 10th 1911.

Receive and forward the undermentioned goods, to be carried at the reduced through rate below the company's ordinary through or local rate, in consideration whereof I agree to relieve the Manchester Ship Canal Company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from any liability for loss, damage, misdelivery, delay, or detention (including detention of trader's trucks) except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons, parties to any through rate under which the goods are carried.

“ All charges to sender (Sender or Consignee)

“ For Manchester Liners Limited

“ Signature of sender or his representative,

“ R. J. Darlington.”

Upon the back of the consignment note were a number of “ General Conditions,” amongst which was the following :—

“ 7. All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses.”

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Manchester Liners, Limited, delivered the billets to the Manchester Ship Canal Company for carriage to Messrs. Tupper & Co. at their Batman's Hill Works under the consignment note, and the billets were delivered by the Manchester Ship Canal Company to the defendants, the Great Western Railway Company, and loaded into that company's trucks for carriage to Tupper & Co.'s works. It was admitted that the defendants were parties to the through rate. On March 24, 1911, information reached the plaintiffs that Tupper & Co. were insolvent, and they immediately instructed Manchester Liners, Limited, to give notice to the defendants to stop delivery of the goods. Manchester Liners, Limited, gave the notice to the defendants on the same day (March 24, 1911).

The defendants had a claim against Tupper & Co. for 1170*l.*, which did not include any sums for freight or other charges in respect of the billets, and the defendants claimed that under clause 7 of the conditions upon the consignment note they had in respect of all sums due to them from Tupper & Co., Limited, a lien as against the plaintiffs. In order to release the goods an agreement was made between the plaintiffs and the defendants that the plaintiffs should pay to the defendants the 1170*l.*, that the defendants should deliver the billets to the plaintiffs or their order, and that if it should be decided in this action that the defendants were not entitled to retain the goods in respect of that sum they would return the amount to the plaintiffs. The plaintiffs accordingly paid the defendants the 1170*l.*, and the defendants by the plaintiffs' order delivered the billets to the Romford Iron Company, Limited.

The only question material to this report was whether, although nothing was due from the plaintiffs to the defendants in respect of the carriage of the goods, the defendants had under clause 7 of the conditions upon the consignment note as against the plaintiffs a lien for the 1170*l.* due to the defendants from Tupper & Co., Limited.

R. F. Colam, K.C., and *F. P. M. Schiller*, for the plaintiffs. In order that the defendants may succeed they must shew that under the condition Manchester Liners, Limited, gave them

a general lien on the goods for any debt due from the owner of the goods. It is contrary to any principle known to the law that one person should give a lien over another's goods. The plaintiffs do not owe the defendants anything, and therefore the defendants have to shew that the consignors, on the assumption that the property has passed to the consignees, gave a general lien over the consignees' goods. They had no right to do that, and if the property has not passed to the consignees under the contract of sale, but has remained in the plaintiffs, the case for the defendants fails because the plaintiffs owe them no debt, and therefore they have no lien. If the word "owner" in the condition on the consignment note has the same meaning as in the bill of lading, it would mean the consignor. If it means "owner for the time being," the effect would be that the plaintiffs were by contract affecting other persons' rights and giving a lien over their property without their consent. That would be the extraordinary result.

The legal owner for the time being may depend upon who has the bill of lading, and that may be a person of whom the plaintiffs know nothing, of whom they have never heard, and who may be under obligations to the railway company of which the plaintiffs know nothing. It might be that the whole of the goods would be more than absorbed by the debt due from some third person. [*Oppenheim v. Russell* (1) and *Leuckhart v. Cooper* (2) were referred to.]

J. R. Atkin, K.C., and *H. A. McCardie*, for the defendants. This is a simple case of a contract made between the plaintiffs by their agents, Manchester Liners, Limited, who were given authority to make it by the bill of lading, and the defendants, under which the clause for a general lien is operative. The effect of the clause is that it stipulates that the defendants may hold the goods in respect of a liability for moneys due on any account from the owners of the goods. The stipulation is probably made in order to protect the railway company against the right of stoppage in transitu by the vendors of goods where, as in the present case, the property has passed to the purchaser. The words of the condition are very effective to give the lien to the

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(1) (1802) 3 Bos. & P. 42.

(2) (1836) 3 Bing. N. C. 99.

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defendants, because all they are seeking is not to defeat the right of stoppage in transitu, but to say to the consignors in effect "if you hand over these goods to us we will only take them upon the basis that we hold them and need not deliver them up until we have been paid anything the consignee owes us." If the consignor chooses to agree to that bargain there is no reason why he should not do so.

In the present case there is an express agreement in the bill of lading authorizing Manchester Liners, Limited, to forward the goods by a connecting carrier on such conditions as "the latter may exact." That authority is obviously intended to extend to special conditions, and there is the usual condition on the consignment note, and that is the condition exacted.

The clause gives the defendants a lien against the owners of the goods, and the plaintiffs have authorized the defendants to hold the goods in respect of that claim against Tupper & Co., Limited, the owners of the goods.

R. F. Colam, K.C., in reply. The effect of the argument on behalf of the defendants is that the condition gives them the right to postpone the plaintiffs' right of stoppage in transitu in favour of a lien for the debt of a third person. The clause is not wide enough to authorize Manchester Liners, Limited, to bind the plaintiffs by such an exceptional agreement. [Sect. 39 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), was referred to.]

Cur. adv. vult.

July 2. The following judgment was delivered by

PICKFORD J. This was an action in form for detinue, but by arrangement between the parties it has become an action in which I have to determine the right to a sum of 1170*l.*, and the real question upon which that depends is whether the defendants were entitled to hold these goods as against the plaintiffs for a general lien for money due to them from a firm of Tupper & Co., Limited, of Bilston, who had bought the goods from the plaintiffs. All the carriage in respect of the goods had been paid and there was nothing owing in respect of them. Tupper & Co., Limited, became insolvent and the plaintiffs claimed to stop the goods in

transitu. The defendants claimed to be entitled to retain the goods against the plaintiffs for a sum of 1170*l.* which Tupper & Co., Limited, owed them, wholly irrespective of these goods. Of course the holding of these goods as against the plaintiffs for a debt with which they had nothing to do—all the charges in respect of these goods having been paid—would be a great hardship to the plaintiffs; but if the defendants have the right in law to do so they are entitled to hold them. The goods were bought by Tupper & Co., Limited, from the plaintiffs on what were practically c.i.f. terms. I assume for the purposes of my judgment that the property in the goods had passed at the time of the matters in question in this action to Tupper & Co., Limited. The goods were shipped upon a through bill of lading, upon a ship called the *Manchester Shipper*, one of Manchester Liners' vessels, and the through bill of lading provided that the goods should be carried to Manchester and there delivered to order, and there were the words "Notify Tupper & Co. Goods to be forwarded to Batman's Hill Works, Bilston, Eng., via Great Western Railway from Manchester and the carrier is authorized by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charges for forwarding but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier." In pursuance of that authority, when the goods arrived at Manchester Mr. Darlington, who represented Manchester Liners, Limited, signed the Manchester Ship Canal Company's consignment note for goods to be carried at reduced rates, which was to this effect: "To the Manchester Ship Canal Company. Manchester Docks, 10th March, 1911. Receive and forward the undermentioned goods, to be carried at the reduced through rate below the company's ordinary through or local rate, in consideration whereof I agree to relieve the Manchester Ship Canal Company and all other companies or persons over whose lines the goods may pass, or in whose possession the same may be during any portion of the transit, from any liability for loss, damage, misdelivery, delay, or detention (including detention of trader's trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose

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from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons, parties to any through rate under which the goods are carried." The goods after passing into the hands of the Manchester Ship Canal Company were handed to the Great Western Railway Company, and it is admitted that the railway company were parties to the through rate. On the back of this note there is the condition upon which the question turns, "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses." That is a general lien clause, which I am told is a very common clause in these consignment notes, and I am also told that no decision as to the meaning and extent of it under circumstances like those in the present case has yet been given, nor, indeed, has the question hitherto been raised. The question is whether—all rates and carriage upon the goods having been paid and there being nothing owing for the carriage of the goods—when the unpaid vendor claims the right which he has to stop the goods in transitu the carriers are entitled to say to him, in effect, "You do not owe us a penny, we have nothing to do with you, and you have the right as between yourself and the purchaser and consignee of these goods to claim to hold them whether the property reverts in you or not, but still we say you shall not have them unless you pay us a debt due from the purchaser of the goods in respect of other goods with which you have nothing to do and which cannot be in any way said to be a debt of yours."

Now that, no doubt, is a position which can be created if the words of the documents are sufficiently clear. Authorities as to the effect of a general lien as against a right to stop goods in

transitu were cited during the arguments, but I do not think that they have really any bearing upon the point, because in those cases there was no agreement for a general lien such as it is contended there is here, and I think that all they shew is that the law does not altogether favour a state of things by which one person may be made to pay another's debt. I do not think they can be said to go further than that, and it is left to me to determine the meaning of this condition.

It is fairly obvious that the condition when framed was not framed with the present sort of case in view. It was framed for the purpose of extending the particular lien which would exist in respect of the carriage of any lot of goods to a general lien in respect of all charges owing from the person who was going to receive those goods, and what was contemplated was that the carrier should not be bound to deliver to that person unless that person had satisfied the general lien and paid his general account as well as the particular charges upon the particular lot of goods. I do not say for a moment that the words of the condition are not large enough to extend considerably beyond that, but I think that the clause may be and ought to be held to be satisfied by extending it no further than that, and by reading it, as it quite well can be read, as meaning that the goods shall be held by the company, and the company shall not be bound to deliver them to the consignee until he, the consignee, has discharged the debt that is due in respect of all goods which have been carried for him by the carrier. That is quite a possible and fair reading of the condition, and it is not necessary that it should be read as meaning that the company should be entitled to hold as against persons who have nothing to do with the debt. I therefore do not think that the defendants were entitled to claim to hold the goods as against the plaintiffs—who stopped them in transitu—in respect of a debt due from the consignees to the defendants with which the plaintiffs had nothing to do and of which they knew nothing. I do not think it is necessary for me to read the condition in such a wide sense as that, and I therefore think that the plaintiffs are entitled to the 1170*l.* which by the agreement between the parties is to abide the event of the decision as to the effect of this condition.

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In my judgment the proper meaning of this condition is that which I have indicated, and, therefore, I give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *A. J. Greenop & Co.*

Solicitor for defendants: *L. B. Page.*

J. E. A.

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July 9.

WESTERN STEAMSHIP COMPANY v. AMARAL
SUTHERLAND & CO.

*Ship — Charterparty — Demurrage — Period of Demurrage not specified —
Detention of Ship beyond a reasonable Time — Damages.*

Where a charterparty provides that if the ship is detained at the port of discharge after the expiry of the lay days demurrage shall be payable at a certain specified rate, but is silent as to the period for which she may be so kept on demurrage, if after the expiry of a reasonable time beyond the lay days the shipowner, instead of landing the goods and taking his ship away, allows her to be further detained, the demurrage rate of compensation will apply to the whole period of detention and not merely to the reasonable time.

POINT OF LAW raised on the pleadings.

The plaintiffs claimed as owners against the defendants as charterers of the steamships *Glenelg* and *Glencluny* under and upon the terms respectively of charterparties dated April 11 and 26, 1912, for damages resulting from the detention of the said vessels at Rio de Janeiro, their port of discharge. By the said charterparties it was provided that the discharge was to be at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted; "if longer detained consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day or pro rata part thereof." The *Glenelg* carried under the first-mentioned charterparty a cargo of 5760 tons of coal. She arrived at Rio and her time began to count on May 17, 1912. Her lay days expired on May 31, but the discharge was not completed until midnight on July 14. The *Glencluny*

carried a cargo of 6421 tons of coal and arrived at Rio, her time beginning to count on June 11, 1912. Her lay days expired at midnight on June 29, and the discharge was not completed until August 13. It was claimed by the plaintiffs that a reasonable time on demurrage would in both cases have been ten days, and that the defendants in breach of the charterparty detained the *Glenelg* for thirty-four and a half days and the *Glencluny* for thirty-two days in excess of such reasonable time. The plaintiffs claimed damages for the detention of the *Glenelg* at 60*l.* per day giving credit for the demurrage rate of 44*l.* 9*s.* 8*d.* per day, and of the *Glencluny* at 65*l.* per day giving credit for the demurrage rate of 51*l.* 2*s.* 4*d.* per day. They also claimed that by reason of the detention the bottoms of both vessels became so foul that it was necessary to dry dock them, whereby expenses were incurred and the vessels were respectively detained a further two and a half days.

The defence alleged (paragraph 3) that each of the said charterparties contained a provision for the payment of demurrage at a fixed rate in the event of the said steamships being detained longer than the time allowed by the terms of the charterparties for discharging, and that the plaintiffs had been paid the full amount of the demurrage in each case in accordance with the terms of the charterparties; (paragraph 4) that no provision either express or implied was contained in either of the charterparties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case; and (paragraph 5) that a reasonable time on demurrage would not in the case of either of the said steamships have been limited to ten or any other number of days, and that the defendants denied that they detained either of the said vessels in excess of the demurrage days.

This question of the construction of the charterparties so raised on the pleadings was ordered to be tried as a preliminary point of law.

Leck, K.C., and *Raeburn*, for the plaintiffs. The charterers were entitled to detain the ships at the demurrage rate for a reasonable time and no longer. So far as relates to detention at

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the port of loading the matter is covered by authority: *Wilson & Coventry, Ltd. v. Otto Thoresen's Linie*. (1) "Where the days on demurrage are not limited by contract they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or to emerge": per Lord Trayner, *Lilly v. Stevenson*. (2) No distinction in principle can be drawn in this respect between detention at the port of loading and detention at the port of discharge. In *Carver on Carriage by Sea*, 5th ed., s. 609, it is said: "Charterparties frequently stipulate for a rate of demurrage, to be paid in case the ship is detained beyond the agreed or proper time, without stipulating for any particular number of extra days to be allowed by the shipowner. In such cases the true view seems to be that the charterers are entitled to keep the ship on demurrage for a reasonable time." The proposition is there stated quite generally and as equally applicable at the port of loading or of discharge. It means that as soon as the reasonable time expires the demurrage rate ceases.

[BRAY J. May it not be that after the expiry of a reasonable time it was in your power to take your ship away, but that if you did not adopt that remedy you could only claim compensation at the demurrage rate?]

No; the fact that the plaintiffs could have properly taken their ship away does not disentitle them to claim damages. It is at their option which remedy they will pursue. In *Hick v. Rodocanachi* (3), where the bill of lading provided that the goods were to be applied for within twenty-four hours of the ship's arrival, otherwise the master was to be at liberty to land them at the consignees' risk, Lindley L.J. (4), in answer to the contention that that provision relieved the consignees from liability to pay damages for being in default, said, "These clauses are obviously inserted in the interest and for the benefit of the shipowner and they give him an additional remedy for the recovery of what is due to him and not a remedy in substitution for any which he would have apart from these clauses." And the same principle applies to the right of the shipowner to land

(1) [1910] 2 K. B. 405.

(2) (1895) 22 R. 278, at p. 286.

(3) [1891] 2 Q. B. 626.

(4) *Ibid.* at p. 632.

the goods and take away the ship after the expiry of a reasonable time for unloading.

Sankey, K.C., and *Inskip*, for the defendants. There is no authority for the proposition that, where a charterparty provides for a rate of demurrage but does not specify the number of days for which that rate shall be applicable, the shipowner may, if he allows the charterer to detain the ship beyond a reasonable time, claim more than the demurrage rate for the extra detention after the reasonable time has expired. All that the passage in *Carver on Carriage by Sea* and the case of *Wilson & Coventry, Ltd. v. Otto Thoresen's Linie* (1) lay down is that the charterer is entitled to detain the ship on demurrage for a reasonable time, that is to say, that the shipowner cannot take away the ship sooner; they do not say that if after the expiry of the reasonable time the shipowner omits to do so the demurrage rate ceases to be applicable. "Where the ship is . . . ready to deliver cargo at the port of destination . . . but the merchant does not take delivery . . . within a reasonable time the master . . . may land and warehouse it (the cargo) or, if this is impracticable, may carry it in his ship or forward it in another ship to such place as may be most convenient for its owner, and can charge the owner with remuneration for and expenses of such carriage under the name of 'back freight'": *Scrutton on Charter Parties*, art. 138, citing *Cargo ex Argos*. (2) If the master does not choose to take that course but allows the ship to be detained he does so subject to the stipulated rate of compensation, however long the detention may last.

Leck, K.C., in reply. The stipulated rate of demurrage only applies to a rightful detention; but the charterer cannot rightfully insist on detaining the ship after a reasonable time has expired. For a subsequent detention the shipowner is entitled to damages.

BRAY J. The question of law which I have to decide in this case is substantially whether the contention in paragraph 4 of the defence is well founded, that contention being that no provision either express or implied was contained in either of the

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(1) [1910] 2 K. B. 405.

(2) (1873) L. R. 5 P. C. 134.

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charterparties that the agreed rate of demurrage should only apply to a reasonable number of days over and above the lay days in each case. Now the clause of the charterparty relating to demurrage provides as follows: "The cargo to be taken from alongside by consignees at port of discharge free of expense and risk to the steamer at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of fourpence per net register ton per running day or pro rata part thereof"; and when one has to construe a written document it is advisable to take the words as they stand and to add nothing to them and detract nothing from them unless one can see that it is absolutely necessary to do so. In this case the steamer was detained for a considerable number of days. Under those circumstances what was to be done? The answer is "If longer detained consignees to pay demurrage." There is no limitation upon those words in the document. Why then should I put any limitation upon them? The limitation which in substance Mr. Leck asks me to put is "if rightfully detained." I have no right to put in that word "rightfully," and, apart from authority, I should have no hesitation in coming to the conclusion that "if longer detained" means if detained whether rightfully or wrongfully. So long as the steamer is in fact detained the agreed rate of demurrage is what the charterer has to pay. But then I was referred to a case which was decided by myself, *Wilson & Coventry, Ltd. v. Otto Thorson's Linie*. (1) That was a case which arose at the port of loading, and what I there decided was that under that charterparty the charterer had a right to detain the vessel for a reasonable time after the expiry of the days allowed for loading. But I think that the reasons which induced me so to decide would also apply to a detention at the port of discharge. But I did not decide what the damages would be if the ship was detained beyond a reasonable time; it was not necessary for me to do so, for she was not in fact detained, the master having wrongfully sailed before the expiry of the loading time. I think the authorities shew this, that after a reasonable

(1) [1910] 2 K. B. 405.

time beyond the lay days has expired at the port of loading the master may take his ship away. I think they also decide that at the port of discharge after a reasonable time, or after the stipulated time if there be one, he may land the goods, in such a way as to preserve his lien, at the port of discharge or, if for some reason he cannot land them there, at some other port to which it may best suit the interests of the consignees that he should take them, and then remove his ship, and recover damages for the expense to which he has been put. But that does not in any way militate against the construction that I am proposing to put on the clause in question in this charterparty. The shipowner has his choice which remedy he will adopt. In this case if he had thought that the demurrage rate would be insufficient to recoup him for the detention he could have landed the coals and taken his ships away. But he did not do that, and under those circumstances he is only entitled, by way of compensation for the detention, to the demurrage rate and no more. I am of opinion, therefore, that the contention in paragraph 4 of the defence is correct, and that, in the absence of an express provision in the charterparty that the demurrage rate should only apply to a reasonable number of days, it applies as long as the ship is in fact detained. There must be judgment on the preliminary point of law for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Rubinstein, Nash & Co., for Vachell & Co., Cardiff.*

J. F. C.

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BENNETT STEAMSHIP COMPANY, LIMITED *v.* HULL
MUTUAL STEAMSHIP PROTECTING SOCIETY, LIMITED.

[1913 B. 1801.]

*Insurance (Marine)—Collision Clause of Lloyd's Policy—Construction of Clause
—" Collision . . . with ship or vessel "—Collision with Nets of Fishing
Vessel.*

Rules of a mutual insurance society of which the plaintiffs were members protected the society in respect of (inter alia) claims for losses, damages, or expenses arising from or consequent upon collision so far as the claims were not recoverable under the usual form of Lloyd's policy with collision clause attached. The collision clause attached to the usual form of Lloyd's policy covers "collision with any other ship or vessel." The plaintiffs' steamship came to anchor during a fog. In a clearing interval the anchor was hove on, but it was found to be foul of the nets of a fishing vessel, which apparently enveloped the steamer and were also foul of the propeller. When the fishing vessel to which the nets were attached was sighted she was about a mile or more distant with the nets extending from her to the plaintiffs' steamship. The hull of the plaintiffs' steamship did not at any time come into contact with the hull of the fishing vessel. The plaintiffs with the consent of the insurance society paid to the owners of the nets the sum to which the damage caused by the plaintiffs' steamer to the nets and the costs and expenses in connection therewith amounted, without prejudice to the question whether the insurance society was liable under its indemnity to the plaintiffs for the loss:—

Held, that in the circumstances there had been no collision with a ship or vessel within the meaning of the collision clause attached to the usual form of Lloyd's policy, and that therefore the insurance society was liable under its indemnity to repay to the plaintiffs the sum the plaintiffs had paid to the owners of the nets.

ACTION tried in the Commercial Court before Pickford J. without a jury.

The action was brought by the plaintiffs, the Bennett Steamship Company, Limited, as members of the defendant association, to recover the sum of 509*l.* 14*s.* due to them under the rules of the association, as an indemnity in respect of a claim for damage done by the plaintiffs' steamship *Burma*. The parties concurred in stating the questions of law arising in the action in the following case for the opinion of the Court.

1. On the evening of October 11, 1912, the plaintiffs' steamship

Burma came to anchor about two miles off Boulogne, being prevented by fog from going into the roadstead. At about 8.45 p.m., the fog clearing, the anchor was lifted, but shortly afterwards the fog came down again and the anchor was let go, it being impossible to see more than about a ship's length. At 9.30 p.m., in a clearing interval, the anchor was hove on, but it was found to be foul of the nets of a fishing vessel, which nets apparently enveloped the steamer and were also foul of the propeller. When the fishing vessel to which the nets were attached was sighted she was about a mile away or more with the nets extending from her to the *Burma*. The hull of the *Burma* did not at any time come into contact with the hull of the fishing vessel.

2. The damage done by the *Burma* to the nets and the costs and expenses in connection therewith amounted to the sum of 509*l.* 14*s.*, which had been paid by the plaintiffs to the owners of the nets with the consent of all the plaintiffs' underwriters, including the defendants, given without prejudice to the denial of each underwriter that such loss was covered by the insurance granted by him.

3. The plaintiffs were members of the defendant association and claimed payment of the 509*l.* 14*s.* from the association under its rules, which provided protection in respect of (c) claims for losses, damages, or expenses arising from or consequent upon collision, and for losses, damages, or expenses arising from or consequent upon damage caused by the entered steamship to other ships or property without actual contact or collision, so far as such claims are not recoverable under the usual form of Lloyd's or Mutual Insurance Association's policy with collision clause attached; and (e) loss or damage caused by such steamship to any harbour, dock or pier, or the quays or works connected therewith, or to any jetty erection or other fixed or movable things whatsoever, other than ships or vessels, whether caused by negligence or otherwise.

4. The collision clause attached to the usual form of Lloyd's policy is as follows: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable

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to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship herein insured this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the ship hereby insured."

5. The defendants contended that the proportion of three-fourths of the damages in question was recoverable by the plaintiffs under the collision clause attached to the usual form of Lloyd's policy, and that their liability extended only to the one quarter, or the sum of 127*l.* 8*s.* 6*d.* not recoverable under a Lloyd's policy with collision clause attached.

6. The defendants paid to the plaintiffs the sum of 127*l.* 8*s.* 6*d.* prior to the commencement of these proceedings.

The question for the opinion of the Court was whether in the circumstances set forth in paragraph 1 there was a collision within the collision clause of a Lloyd's policy. If the Court should be of opinion in the negative, judgment was to be entered for the plaintiffs for the sum of 382*l.* 5*s.* 6*d.* and costs of the action. If the Court should be of opinion in the affirmative, judgment was to be entered for the defendants with the costs of defence.

H. M. Robertson (*G. P. Langton* with him), for the plaintiffs. The nets of a fishing vessel which may extend two miles from the ship cannot be said to be part of the ship. She may cast off and buoy her nets, and in *The Cockatrice* (1) it was held that when she does so she ought to display her "under way" lights. The collision with the nets was not a collision with the ship within the plain and ordinary meaning of the expression, and the onus is therefore upon the defendants to shew that the words bear in law or from the context some other than their natural meaning. The decision in *The Niobe* (2) is distinguishable. A tug is an ordinary instrument of navigation, and the tug and tow may therefore be regarded as one vessel, but fishing nets are not instruments of navigation. Moreover, in *The Niobe* (2) what may be called an abnormal ship was insured and came into

(1) [1908] P. 182.

(2) [1891] A. C. 401.

collision with a normal one. In the present case an ordinary ship was insured and came into contact with an abnormal instrument. In *In re Margetts and Ocean Accident and Guarantee Corporation* (1) the Court obviously had the decision in *The Niobe* (2) in mind and followed it, and further illustrations of the same principle appear in *The Warwick* (3), *Gale v. Laurie* (4), and *Hoskins v. Pickersgill*. (5) In giving judgment in *In re Salmon and Woods* (6) Wills J. said that a ship "would include, spare sails, duplicate anchors, anything in fact which it would not be prudent to send a ship to sea without."

It could not be said (except in a business sense) that it would not be prudent to send a ship to sea without her fishing nets. The word "ship" does not include more than her ordinary and necessary gear.

Further, in the present case there was no collision. The expression "fouled the nets" would be applicable to what took place. Paragraph 3 (c) of the case draws a distinction between "contact" and "collision."

F. D. Mackinnon, for the defendants. The decision in *Chandler v. Blogg* (7) that a collision with a sunken barge was a collision with a navigable vessel within the meaning of a policy of re-insurance shews that a liberal construction has been placed by the Courts upon clauses of this nature. The question is whether, having regard to the authorities, there was, in the circumstances, a collision with a ship or vessel. It may be that a decision in the affirmative would be going further than any of the decided cases, but that, of itself, does not shew that the present case is outside the principle upon which those decisions were based. It is fairly obvious that if in *In re Margetts and Ocean Accident and Guarantee Corporation* (1) the Court had had before it the question whether fishing nets were part of a vessel they would have held that they were. Although the subject-matter in *Gale v. Laurie* (4) was different from that in the present case, fishing tackle came under consideration, and in *In re Margetts and Ocean Accident and Guarantee Corporation* (1) Phillimore J. said that the

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(1) [1901] 2 K. B. 792.

(O.S.) (K.B.) 149.

(2) [1891] A. C. 401.

(5) (1783) 3 Doug. 222.

(3) (1890) 15 P. D. 189.

(6) (1885) 2 Morr. 137.

(4) (1826) 5 B. & C. 156; 4 L. J.

(7) [1898] 1 Q. B. 32.

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Court had derived assistance from *Gale v. Laurie* (1), thereby intimating that he considered that fishing nets were in an analogous position to anchors. The fact that the application of a principle to a particular case may be absurd does not shew that the principle is unsound. The principle is that "ship" means the ship and her appurtenances, and applying that principle to the present case the decision in *In re Margetts and Ocean Accident and Guarantee Corporation* (2) is an authority directly in favour of the plaintiffs, who are in the position of an assured who is suing underwriters upon a policy containing the collision clause.

PICKFORD J. I am of opinion that the plaintiffs are entitled to recover the sum they claim. The question is whether in the circumstances of this case there was a "collision with any other ship or vessel" within the meaning of the collision clause attached to the usual form of Lloyd's policy. The plaintiffs under the provision contained in the defendant society's rules are entitled to recover if the ship insured comes into collision with any other ship or vessel and the claims for losses, damages, or expenses arising from or consequent upon the collision are not recoverable under the Lloyd's policy clause. The circumstances are stated in paragraph 1 of the special case. [Having read the paragraph, the learned judge continued:] It is perfectly clear that as a matter of ordinary language no one would say that the *Burma* came into collision with another ship or vessel. If any one were asked, apart from decided cases, whether to run into a net at a distance of a mile from the ship, the ship being attached to the other end of the net, was running into the ship, I do not suppose he would hesitate to reply in the same sense as that which Lord Bramwell expressed in giving judgment in *The Niobe* (3), namely, that as a matter of ordinary English she did nothing of the sort. But on behalf of the plaintiffs it is said that the present case is covered by authority. The fishing vessel was not quite like a trawler because her drift nets were put out. No doubt the drift net generally remains close to the

(1) 5 B. & C. 156; 4 L. J. (O.S.)
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(2) [1901] 2 K. B. 792.

(3) [1891] A. C. 401.

vessel and for a great part of the time the vessel is attached to one end of the net, which may be a mile or more long, by a warp; but at times she is disconnected from the net altogether, as was the case in *The Cockatrice* (1), and steams about for the purpose of examining the nets. As a matter of ordinary English I do not think any one would say that coming into collision with the end of a net a mile away from the ship is coming into collision with the ship. But it is said on behalf of the defendants that the principles upon which previous cases have been decided oblige me to hold that there was in the present case a collision with the ship. One of the cases cited was *The Niobe* (2), but the decision in that case turned almost entirely upon the theory that the tug and the tow were one ship. Whether that theory is held quite so strongly now as it was at the time of the decision in *The Niobe* (2) is a matter I need not discuss, but it turned upon the theory I have mentioned and upon what was laid down by Lord Morris, namely, that the tug was part of the machinery of the ship, or, to use his exact words, "I consider the tug part of the apparatus for moving the ship." Another case is *In re Margetts and Ocean Accident and Guarantee Corporation*. (3) In that case the collision was with an anchor by which a ship was moored, and that was held to be a collision with the ship. That may be going rather further possibly than *The Niobe*. (2) It may perhaps very well be said that the anchor which is used for the purpose of mooring a ship and is necessary for its navigation, and without which she could not prudently put to sea (to use, in effect, the words of Wills J. in *In re Salmon and Woods* (4)), is a part of the ship; but it does not seem to me that there is any principle laid down in those authorities which obliges me to extend them still further, and to hold that the end of a net—to which the ship is not necessarily always attached, because she leaves it from time to time—a mile away from the ship is a part of the ship, or that a collision with the end of that net is a collision with the ship. It may be that the principle upon which those cases were decided (whatever it may be) ought to be held

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(1) [1908] P. 182.

(2) [1891] A. C. 401.

(3) [1901] 2 K. B. 792.

(4) 2 Morr. 137.

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to extend the meaning of the words used in the judgments to the circumstances of the present case, but I am unable to see anything which compels me to so hold, and such an extension must be made by the Court of Appeal if it is to be made. I am unable to see that I can—giving any weight to the ordinary meaning of language—hold that there was in the present case a collision with the ship. I therefore think that there was no collision within the collision clause attached to the usual form of Lloyd's policy, and there not being a collision within the meaning of the clause, the case is within the rules of the defendant society, and they are therefore liable for the amount the plaintiffs sue for. There will be judgment for the plaintiffs for 382*l.* 5*s.* 6*d.* with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Botterell & Roche, for Hearfields & Lambert, Hull.*

J. E. A.

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[1912 G. 807.]

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June 12;

July 9.

Foreign Judgment—Colonial Judgment—Defendant born in Colony—"Subject" of Colony—Defendant not resident or domiciled there—Enforceability of Judgment.

The fact that a person is born in a British colony does not make him a "subject" of that colony so as to make a judgment recovered against him in his absence in the Colonial Court enforceable in this country.

The defendant was born in the Colony of Victoria, Australia, and resided for twenty-six years there until 1890, when he came to live in England. Neither of his parents was born in Victoria. Since 1890 he visited Victoria on several occasions, the last being in 1906. In 1911 the plaintiffs issued a writ against him in the Supreme Court of Victoria to recover a sum of money as being due on accounts stated. The writ was served on the defendant in England, but he did not appear, and the plaintiffs signed judgment in the Victorian Court against him in default of appearance. In an action in England upon the judgment, the plaintiffs contended that, as the defendant was born in Victoria, he was a "subject" of that Colony, and that therefore the judgment was enforceable here:—

Held, that the defendant was a subject of the King, and not a "subject" of Victoria so as to render the judgment recovered against him in his absence binding upon him in this country, and that therefore the judgment was not enforceable here.

TRIAL before Atkin J., without a jury, of a preliminary issue in the action.

The action was brought to recover 2755*l.* 13*s.* 5*d.*, the amount of a final judgment recovered by the plaintiffs against the defendant on March 9, 1912, in the Supreme Court of Victoria, Australia, for moneys due on accounts rendered and stated during the years 1898 to 1910, the particulars of which were as follows: 2668*l.* 5*s.* 11*d.*, balance of accounts rendered, 63*l.* 14*s.* 10*d.* interest to date of judgment, and 23*l.* 12*s.* 8*d.* taxed costs. The writ was subsequently amended by adding a claim for 2668*l.* 5*s.* 11*d.*, the original sum due upon accounts rendered and stated, and interest thereon.

Paragraph 2 of the defence was as follows: "If any such judgment was obtained (which is not admitted) the defendant

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says that the Supreme Court of Victoria has no jurisdiction over him or over the alleged cause of action. The defendant was not at the commencement of the action in which the said judgment was obtained in the Commonwealth of Australia nor was he at any material time prior to the recovery of the said judgment resident or domiciled within the jurisdiction of the said Court. The defendant further says that he was not subject to the laws of the said Commonwealth, and that he was under no obligation to and did not in fact submit to the jurisdiction of the said Court, and that he did not appear in the said action or defend the same." Paragraph 3: "By reason of the premises the defendant will contend that, in so far as it is founded on the said judgment, the statement of claim discloses no cause of action." The defendant also pleaded to the rest of the claim.

An order, as amended by the Court of Appeal, was made that upon the plaintiffs undertaking to limit their evidence on the trial of the preliminary question to the defendant's answers to interrogatories (except for certified copy of judgment and affidavit of service of and copy of Victorian writ here), the question raised in paragraph 2 of the defence be tried in the first instance.

It appeared from the answers to the interrogatories that the defendant was born in Victoria, Australia, and lived at Melbourne for twenty-six years until 1890, when he came to live in England. Since 1890 he had lived chiefly in London, but had visited Victoria in 1891 for six months, in 1893 for twelve months, in 1897 for six months, in 1900 for twelve months, in 1902 for six months, and in 1906 for two weeks. Neither of his parents was born in Victoria; they both lived a good deal in Victoria, paying several visits to England during their lifetime, but he was unable to specify the periods during which they so lived in Victoria or the places at which they lived. The defendant authorized one Cabena to act as his agent in Victoria for the management of his affairs there since his departure from Victoria in 1890, and he instructed Cabena to defend the action and to instruct solicitors, but the action was not defended.

The writ in the action in the Supreme Court of Victoria for service out of the jurisdiction was issued on June 15, 1911, and a copy of the writ was served on the defendant personally in

England on November 21, 1911. The defendant did not appear in the action, and on March 9, 1912, judgment was signed against him in default of appearance. Thereupon the writ in the present action was issued.

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O. F. Dowson (Holman Gregory, K.C., with him), for the plaintiffs. The defendant having been born in Victoria is a native of that State, and is therefore a "subject" of it in the sense that he owes allegiance to it. A colonial judgment stands in the same position as a foreign judgment, and the same rules of law are applicable to both. In *Emanuel v. Symon* (1) Buckley L.J., adopting the language of Fry J. in *Rousillon v. Rousillon* (2), stated the five cases in which the Courts of this country will enforce a foreign judgment, the first being, where the defendant is a subject of the foreign country in which the judgment has been obtained. The same principle is laid down in *Schibsby v. Westenholz* (3); *Copin v. Adamson* (4); Dicey on Conflict of Laws, 2nd ed., pp. 368, 369. As Best C.J. said in *Douglas v. Forrest* (5), when delivering the judgment of the Court of Common Pleas, "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it." In that case the action was on a judgment of the Court of Session in Scotland, and a judgment of the Supreme Court of Victoria is equally enforceable on the same ground. In *Turnbull v. Walker* (6) Wright J. spoke of a person being a "native of New Zealand," as distinct from a person domiciled there, thus indicating that where a person is born in a colony its Courts have jurisdiction. Though in the ordinary sense every British subject is a subject of the King and owes allegiance to him, for the purpose of considering whether the judgment of a Colonial Court is enforceable in this country, each colony must be considered for this purpose as a foreign State. Buckley L.J. in stating the rule in *Emanuel v. Symon* (1) did not intend to draw any distinction between a foreign and a colonial judgment.

(1) [1908] 1 K. B. 302, at p. 309.

(2) (1880) 14 Ch. D. 351, at p. 371.

(3) (1870) L. R. 6 Q. B. 155, at p. 161.

(4) (1874) L. R. 9 Ex. 345, at p. 354; affirmed (1875) 1 Ex. D. 17.

(5) (1828) 4 Bing. 686, at p. 703.

(6) (1892) 67 L. T. 767, at p. 769.

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A person who is a British subject and as such owes allegiance to the King is to be considered as owing allegiance to the colony in which he was born. He is a "subject" of that colony. An artificial meaning must be given to that word, otherwise the judgments of Colonial Courts would stand on a different footing from the judgments of the Courts of a foreign country and it would be more difficult to enforce them in this country. The defendant is therefore a subject of the State of Victoria, and this Court will enforce the judgment of the Supreme Court of Victoria against him.

Next, the defendant was domiciled in Victoria, and upon that ground the judgment is enforceable here against him. Further, the defendant by instructing his agent in Victoria to employ a solicitor and defend the action submitted to the jurisdiction, or at all events is estopped from saying that he did not submit.

J. Sankey, K.C., and *W. V. Ball*, for the defendant. The judgment against the defendant having been signed in default of appearance, the onus is on the plaintiffs of shewing that the defendant was subject to the jurisdiction of the Victorian Court. The cases in which, in an action in personam, the Courts of a foreign country have jurisdiction over a person are stated in *Dicey on Conflict of Laws*, 2nd ed., p. 361, the material one being "Case 2. Where the defendant is, at the time of the judgment in the action, a subject of the Sovereign of such country"; and on p. 368 under this heading "allegiance" is discussed, and it is said that "the doctrine, however, that allegiance is sufficient to give jurisdiction, though supported by judicial dicta, cannot be established by any reported decision." The defendant is not a "subject" of the State of Victoria. The mere fact that a person is born in a country does not make him the subject of that country. If it were so, every person born in a foreign country would become a subject of that country. The ground of the decision in *Douglas v. Forrest* (1) is that "a natural born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws." That is pointed out in *Dicey on Conflict of Laws*, 2nd ed., p. 369. Assuming for the purposes of the argument

(1) 4 Bing. 686, at p. 702.

that allegiance is the test, a British subject owes allegiance to the King alone. He owes no allegiance to a colony. The test laid down by Buckley L.J. in *Emanuel v. Symon* (1), that the defendant is a subject of the foreign country in which the judgment has been obtained, does not apply to a colony. A colonial born subject of the King owes no allegiance to the colony in which he was born. The question of allegiance can only arise where there are two countries each having an independent Sovereign. In the case of a colony allegiance cannot be the test of jurisdiction. The discussion of allegiance is not *ad rem* in such a case. The defendant therefore is not liable on the judgment. [*Sirdar Gurdyal Singh v. Rajah of Faridkote* (2) and Dicey on Conflict of Laws, 2nd ed., pp. 164—166, were also referred to.]

[They were not called upon to argue the other points.]

Dowson in reply.

Cur. adv. vult.

July 9. ATKIN J. read the following judgment:—On June 15, 1911, the plaintiffs, a limited company, by their liquidator, who was resident in Sydney, New South Wales, issued a writ in Melbourne for service out of the jurisdiction against the defendant, described as of 8, Chester Terrace, Regent's Park, London, England, claiming a sum of 2668*l.* 5*s.* 11*d.*, money due to the plaintiffs by the defendant on accounts rendered and accounts stated from time to time during the years 1898 to 1910 between the plaintiffs and the defendant, and interest on the said sum from service of the writ at the rate of 8 per cent. per annum. The writ was served upon the defendant in London on November 21, 1911; the defendant did not appear to the writ in Melbourne, and on March 9, 1912, after the expiration of the time limited by the writ for appearance, the plaintiffs by leave of a judge of the Supreme Court of Victoria signed judgment against the defendant for 2732*l.* 0*s.* 9*d.* and costs to be taxed, which costs were afterwards taxed and allowed at the sum of 23*l.* 12*s.* 8*d.*, making a total sum of 2755*l.* 13*s.* 5*d.* For this the plaintiffs sued the defendant in this action by writ dated

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(1) [1908] 1 K. B. 302, at p. 309.

(2) [1894] A. C. 670.

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April 26, 1912, claiming the said sum as being due on the foreign judgment recovered in the Supreme Court of Victoria. By subsequent amendment the plaintiffs added a claim on the original debt. The defendant by his defence, paragraph 2, pleaded: "The defendant says that the Supreme Court of Victoria has no jurisdiction over him or over the alleged cause of action. The defendant was not at the commencement of the action in which the said judgment was obtained in the Commonwealth of Australia, nor was he at any material time prior to the recovery of the said judgment resident or domiciled within the jurisdiction of the said Court. The defendant further says that he was not subject to the laws of the said Commonwealth, and that he was under no obligation to and did not in fact submit to the jurisdiction of the said Court, and that he did not appear in the said action or defend the same." He further pleaded to the alternative claim. On March 5, 1913, an order was made in chambers and affirmed by the judge that the question raised in the second paragraph of the defence be tried in the first instance. On appeal to the Court of Appeal that appeal was dismissed upon the plaintiffs undertaking to limit their evidence on the trial of the preliminary question to the defendant's answers to interrogatories except for certified copy of judgment and affidavit of service of and copy of Victorian writ. This question was tried before me on the terms mentioned in the order of the Court of Appeal. No evidence was given before me as to where the plaintiffs carried on business, where the alleged debt was payable, or as to the statutory rules or otherwise by which the Supreme Court of Victoria is governed in issuing writs for service out of the jurisdiction, or as to any order giving leave to issue this writ for service on the defendant. I assume, however, for the purposes of this judgment that the Supreme Court of Victoria have by Victorian statute similar powers as to granting leave for service out of the jurisdiction as the English Courts have, and that the judgment was regular and enforceable in Victoria.

It was contended before me by counsel for the plaintiffs that the colonial judgment was enforceable here for three reasons: (1.) that the defendant was born in Victoria; (2.) that the defendant was domiciled in Victoria; (3.) that the defendant

having instructed an agent in Victoria to instruct a solicitor in Victoria to defend the action was estopped from denying that he had submitted to the jurisdiction. I can dispose of the third point shortly by saying that the solicitor did not defend the action, and I can see nothing in the alleged facts which would give rise to the estoppel relied on.

As to the second point, the facts as proved by the answers to interrogatories, which were the only evidence admissible under the order of the Court of Appeal, were that the defendant was born in Victoria and lived at Melbourne for twenty-six years until 1890, when he came to live in England. Since 1890 he had lived chiefly in London, but had visited Victoria during the following periods: in 1891 for six months, 1893 for twelve months, 1897 for six months, 1900 for twelve months, 1902 for six months, 1906 for two weeks. Neither of the defendant's parents was born in Victoria. They both lived a good deal in Victoria, paying several visits to England during their lifetime, but the defendant was unable further to specify the periods during which they so lived in Victoria, or the places at which they lived. From the above facts I am unable to draw the inference that the defendant's domicile of origin was Victoria, or that he had acquired there a domicile of choice. If I had to draw any inference I should conclude that the defendant, who says that in 1890 he came to live in England, had acquired an English domicile. It becomes unnecessary to consider whether, if the defendant's domicile had been in Victoria, this Court would have been bound to give effect to a Victorian judgment against him in a personal action for debt. I am content to record a doubt.

The remaining question is whether the fact that the defendant was born in the Colony of Victoria entitles the plaintiffs to contend that the jurisdiction of the Victorian Court over him will be recognized when he is sued in this country on the Victorian judgment. It is a question of importance, and in view of some of the decisions and dicta cited to me I thought it advisable to consider my judgment. The ordinary rule is that all jurisdiction is properly territorial. *Extra territorium jus dicenti impune non paretur*. The principles upon which the Court will enforce here a judgment of a foreign Court are thus stated in the

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judgment of the Judicial Committee in the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1) by Lord Selborne, delivering the judgment of the Board consisting of Lord Selborne, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand, and Sir Richard Couch: "Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ('Actor sequitur forum rei'); which is rightly stated by Sir Robert Phillimore (*International Law*, vol. 4, s. 891) to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and 'extra territorium jus dicenti impune non paretur.' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the Sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced." It is to be observed that in the above passage when dealing affirmatively with the conditions under which

(1) [1894] A. C. 670, at p. 683.

jurisdiction is recognized it says nothing as to the nationality of the defendant. It does, however, in negative form deal with the matter: "But no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates."

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Three decisions were cited to me in which the fact of the defendant being a subject of the country in which the foreign judgment was pronounced was treated as one of the conditions which would entitle the foreign judgment to recognition here. In *Schibsby v. Westenholz* (1) Blackburn J., delivering the judgment of the Court of Queen's Bench, says: "Now on this we think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them." I think the reference is to the provisions of the Code Civil as to service on absent defendants by service on the procureur impérial. The passage seems to assume that if the defendant were bound by the Code as a French subject he would be regarded in this country as bound by the judgment. The defendant in that case was not a French subject, but was a Dane resident in England, and the decision of the Court was that the French judgment could not be enforced against him.

In *Rousillon v. Rousillon* (2) Fry J., in stating the circumstances which he says have been held to impose upon the defendant the duty of obeying the decision of a foreign Court, states as first in the list, "Where he is a subject of the foreign country in which the judgment has been obtained." In that case the judgment was a French judgment obtained against a Swiss subject resident in England, and the decision of Fry J. was in favour of the defendant.

In *Emanuel v. Symon* (3) Buckley L.J. says: "In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment." He then proceeds to state the five cases in the language of Fry J. in *Rousillon v. Rousillon* (2),

(1) L. R. 6 Q. B. 155, at p. 161. (2) 14 Ch. D. 351, at p. 371.

(3) [1908] 1 K. B. 302, at p. 309.

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beginning with the first case in the words cited above. Kennedy L.J. further refers to what he calls the table of the classes of cases laid down by Fry J. and says (1): "Concerning the first four classes mentioned, no subsequent judgment has expressed any disagreement or doubt." In that case the judgment was a judgment of the Supreme Court of Western Australia. The defendant at the time of the judgment appears to have been a British subject resident in England. There is nothing to indicate that he was born in the Colony. He was held not to be bound by the judgment.

It will be apparent that in none of the above cases was the defendant in fact a subject of the country where the judgment sued on was pronounced, nor was it claimed that he was, and the judicial expressions above referred to are therefore in the nature of obiter dicta. They are, however, of so great weight that I should probably feel compelled to follow them, and I therefore have to consider whether the defendant in this case was a subject of the country in which the judgment was obtained. In the ordinary use of the words it appears to me that he was not. Being born within the British dominions he became a British subject, and in respect of nationality his position was precisely the same as that of any of his fellow subjects born in any other part of that wide and varied territory. Nationality, as we recognize it, is based on the tie of allegiance, a personal duty owed to a Sovereign. There is one King of the British dominions, one uniform tie of allegiance binding all persons alike born within the dominions. On this point as a Court of first instance I am bound by the decision of Farwell J. in the case of *In re Johnson, Roberts v. Attorney-General*. (2) The question there was as to the law governing the distribution of the movables of a testatrix born in Malta and found by the certificate to have been born a subject of the British Crown and to have had her domicile of origin in Malta. She had acquired a domicile of choice at Baden, which was her domicile at her death. The Baden Courts apply the law of the nationality of the deceased in distributing movables and ignore domicile. The learned judge came to the conclusion that the nationality was English and that he must

(1) [1908] 1 K. B. at p. 312.

(2) [1903] 1 Ch. 821.

apply English law ; that English law would apply the law of the domicile, which in this case must be the domicile of origin, namely, Malta. The judgment is very much to the point and I read it at some length (1) : “ When it is said that the Baden Courts regard the nationality of the propositus, I apprehend that this means that they distribute according to the law of the nation to which the propositus belongs, or, in other words, of which he is a subject. But the British Empire consists of a large number of States, countries, and colonies, and differs from Continental nations in that it does not impose its own laws wherever its sway extends, but admits many different systems of law within its bounds. There is no one uniform law of this Empire which can be taken for this purpose as the law of the nationality of the propositus. To what nationality, then, does the propositus belong, or of whom is he a subject? The only possible answer appears to me to be that he is a subject of the British Crown, and that his nationality is the British Empire; but inasmuch as there is no one law of the Empire to which the rule in question can refer, resort must be had to the law of England. The first proposition seems to be clear. Whether born in England, Scotland, Canada, Cape Colony, or the Channel Islands or elsewhere within the Empire, he is a natural-born subject of the Crown, and, as *Calvin's Case* (2) shews, the Crown is one and indivisible, and cannot be severed into as many distinct kingships as there are kingdoms; and even if it could, how is it possible to determine what is a distinct kingdom? Even if India or some of our great colonies could lay some claim to be so considered, how could the Isle of Man, or, indeed, Scotland, since the Act of Union? But to admit that either of these latter must be treated as one with England would let in all the inconveniences which have been pointed out in argument, and would, moreover, create an extraordinary anomaly. I base my decision on principle and on considerations of policy and convenience. ‘Allegiance is the tie or ligamen which binds the subject to the King in return for that protection which the King affords the subject’: 1 Blackstone, 21st ed.,

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(1) [1903] 1 Ch. 821, at pp. 832, 833. (2) (1608) 7 Rep. 27b; 2 St. Tr. 559.

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p. 366. As is said in *Calvin's Case* (1), 'Protectio trahit subjectionem et subjectio protectionem.' It is admitted that it is the same thing for this purpose to say that the *propositus* is the subject of X., as to say that he belongs to the nationality of X. I see no way in which the *propositus* can claim to belong to a separate part of the King's dominions or to a separate nationality without denying allegiance to the King as supreme over the whole Empire as one Empire. The point appears to me to be involved in, and to be decided by, *Calvin's Case*. (1) Although there were at that time—James I.'s reign—two distinct kingdoms of England and Scotland, each with its own code of laws, it was resolved by the Lord Chancellor and twelve judges that there was but one allegiance to one King, and therefore that a Scottish-born subject of the King was no alien in England. To quote the resolution at 10a of the report: '*Ligeantia naturalis nullis claustris coeretur, nullis metis refrenatur, nullis finibus premitur.*' And consistently with this we find that when the East India Company was abolished by 21 & 22 Vict. c. 106, it was enacted (s. 2): 'India shall be governed by and in the name of Her Majesty.' So, too, the sanction, either expressed or implied, of the Crown, is required for the validity of the Acts of all Colonial Legislatures."

It was, however, contended before me that, although in the ordinary sense of the word the defendant was not a subject of the Colony of Victoria,* yet for the purpose of investigating whether the jurisdiction of a Colonial Court would be recognized in this country the words must be given an artificial meaning, and it was strongly urged that the case of *Douglas v. Forrest* (2) in 1828 was an authority to the effect that a Scotch judgment obtained against a defendant resident abroad would be enforced in this country if the defendant were a native of Scotland. In that case in the year 1799 one Hunter had acknowledged himself indebted to a firm of Stein, Smith & Co. and to Smith in the respective sums of 447*l.* and 75*l.*, and in the same year had left Scotland for India, where he remained till his death in 1817. The defendant was his executor. In February, 1802, the creditors had obtained in the Court of Session decrees against

(1) 7 Rep. 5a.

(2) 4 Bing. 686.

him in his absence for payment of the said sums. The defendant had been duly served in accordance with the then law of Scotland by proclamation "at the Market Cross of Edinburgh and the pier and shore of Leith," and by decrees of July, 1804, the Court adjudged that certain heritable property to which Hunter was entitled in Scotland should belong to the creditors in satisfaction of the debt. It was proved that by the law of Scotland the defendant might at any time within forty years dispute the merits of the decrees, and that the decrees adjudging the heritable property to the creditors would not preclude the defendant from exercising his right to dispute, and would not operate as satisfaction during such forty years. The plaintiffs were the assignees in bankruptcy of the above-mentioned creditors, and they sued the defendant in assumpsit on the two decrees of the Court of Session made in 1802. The argument on either side appears to have turned upon whether the decisions were contrary to natural justice. Reliance was chiefly placed upon the fact that Hunter left property in Scotland, and it was argued that by analogy to the process of foreign attachment in the City of London the Scotch procedure must be taken to be reasonable. Best C.J. in delivering the judgment of the Court of Common Pleas, which consisted at that time besides himself of J. A. Park, Burrough, and Gaselee JJ., at p. 700 says: "On the first question"—that is, whether an action is maintainable—"we agree with the defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them; but we think that these decrees are perfectly consistent with the principles of justice." He then proceeds to justify this view by reference to the custom of foreign attachment, and at pp. 702, 703 runs the passage relied on: "A natural born subject of any country, quitting that country, but leaving property under the protection of its law, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation. The deceased, before he left his native country, acknowledged, under his hand, that he owed the debts; he was under a moral obligation to discharge those debts as soon as he could. It must be taken for granted,

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from there being no plea of plene administravit, that the deceased had the means of paying what was due to the bankrupts. The law of Scotland has only enforced the performance of a moral obligation, by making his executor pay what he admitted was due, with interest during the time that he deprived his creditors of their just debts. The reasoning of Lord Ellenborough, in the case of *Buchanan v. Rucker* (1), is in favour of these decrees. Speaking of a case decided by Lord Kenyon, his Lordship says, in that case the defendant had property in the island, and might be considered as virtually present. The Court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects that case is unlike the present. In the case of *Cavan v. Stewart* (2) Lord Ellenborough says, you must prove him summoned, or, at least that he was once in the island of Jamaica, when the attachment issued. To be sure if attachments, issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the Legislature of any country might authorise their Courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its Courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it." If Best C.J. meant that the testator being a British subject was bound by the laws of any part of the British dominions I think his decision is clearly inconsistent with *Emanuel v. Symon*. (3) If, as seems more probable, by "allegiance to the country in which the judgment was so given against him" he meant allegiance to Scotland, he must have been using the words in some artificial sense, for the Crown of Scotland and England had been one and

(1) (1807) 1 Camp. 63 ; (1808) 9 East, 192. (2) (1816) 1 Stark. 525.

(3) [1908] 1 K. B. 302.

indivisible for over 200 years, and the two kingdoms united for over 100 years : see *Calvin's Case*. (1) It is, however, apparent that neither in the argument nor in the decision is it suggested that it would be sufficient for the plaintiff's case that the defendant was a native of Scotland. The judgment contains references to the defendant having property in Scotland, a circumstance which the case of *Emanuel v. Symon* (2) clearly decides to be irrelevant. It belongs to a period when the law relating to foreign judgments had not been investigated as fully as at the present time, and, unless precisely similar circumstances were to recur, appears to me to be of little value. I cannot treat this case as a decision that the judgments obtained in the Courts of the British dominions against absent defendants born in that part of the British dominions over which the Courts have territorial jurisdiction are on that ground only binding elsewhere.

The only other authority to which I was referred or which I can discover is the case of *Turnbull v. Walker* (3), decided in 1892. In that case the plaintiffs sued on a judgment obtained in the Supreme Court of New Zealand against the defendant, who was not at the time resident in New Zealand. Wright J. held that the judgment was not binding on the defendant, but in so deciding said : "Jurisdiction of this kind ordinarily depends on the allegiance of the party or his consent or on some fact which is held to be equivalent to allegiance or consent" ; and further on he says : "No merely local statute could, in my opinion, enable the Court to entertain the action against the absent Englishman, who was neither a native of New Zealand nor domiciled there nor present" &c. I think that this case is no authority for the proposition that if the defendant had been a native of New Zealand the judgment would have been binding upon him. Such a point could not arise in the case and was not argued, and I think the learned judge's reference to the defendant not being a native was made to shew that the point did not arise.

In the absence therefore of any express authority compelling me to hold that a person born in one of the British Colonies

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(1) 7 Rep. 27b.

(2) [1908] 1 K. B. 302.

(3) 67 L. T. 767.

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becomes a subject of that colony so that the judgments of its Courts obtained against him in his absence are binding upon him in all other Courts, I decline to accept so far-reaching a proposition. By the principles of the English law of nationality not only the native but his sons and his sons' sons would or might be subjects. There are statutory means by which a British subject can put off his British nationality, but I know of no statute by which a Victorian subject, if such there be, can cease to be a Victorian subject and become South African, Canadian, or English. At common law *nemo potest exuere patriam*. As far as I can ascertain, the alleged principle has never been established or even contended for in any Colonial Court. I think, therefore, that the plaintiffs' third point fails.

It was not argued before me that the judgment was binding in this Court because the judgment would be binding in Victoria (see *Ashbury v. Ellis* (1)), or because the defendant was a British subject. These points would, in my view, in no case have availed the defendant, and are disposed of by the reasoning in the first part of the judgment of Scrutton J. in the recent case of *Phillips v. Batho* (2), with which I respectfully agree.

For the above reasons I decide the question raised by the second paragraph of the defence in favour of the defendant, who must have the costs of the hearing before me in any event.

Order in favour of defendant.

Solicitors for plaintiffs: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for defendant: *Rawle, Johnstone & Co.*

(1) [1893] A. C. 339.

(2) Ante, p. 25.

GAUNT, APPELLANT *v.* INLAND REVENUE
COMMISSIONERS, RESPONDENTS.

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Revenue—Income Tax—Super-tax—Partner—Share of Profits of Partnership Business—Method of assessing Partner to Super-tax—Finance Act, 1907 (7 Edw. 7, c. 13), s. 20—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66.

For the purposes of super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the income of a partner from the profits of the partnership is to be taken to be the share of those profits to which he was entitled, under the partnership agreement, for the year preceding the year of assessment to super-tax, such profits of the partnership being ascertained on an average of the three preceding years.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts upon an appeal against an assessment to the super-tax.

The appellant was a partner in a firm of merchants. The firm was assessed to income tax, under Sched. D, in respect of its profits for the year ended April 5, 1909, in the sum of 54,646*l.*, which was arrived at in accordance with the provisions of the Income Tax Acts by taking the profits of the firm in the three previous years and dividing by three. Under the provisions of the articles of partnership the share of the appellant in the profits of the firm from October 1, 1907, to September 30, 1908, was 19 per cent.; and from September 30, 1908, to April 5, 1909, he was entitled to a further 2½ per cent. of the profits. In addition to his share of the profits, the appellant was entitled to 5 per cent. interest on his capital for the time being in the firm and to a salary of 400*l.* a year.

For the year ended April 5, 1910, an assessment to the super-tax was made upon the appellant in the sum of 8059*l.*, namely, 11,059*l.* less 3000*l.* for the statutory deduction. In making that assessment the appellant's income in respect of the share to which he was entitled in the partnership profits, computed according to the directions contained in s. 20 of the Finance Act, 1907 (1), was taken to be 10,929*l.*; this sum was arrived at by

(1) 7 Edw. 7, c. 13, s. 20: "Where in partnership with any other person makes any claim for exemption, relief, or abatement under the an individual carrying on or exercising any profession, trade or vocation

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deducting from the 54,646*l.* at which the firm was assessed for the year ended April 5, 1909, the deposit interest, salaries of partners, and interest on capital, and then taking the appellant's share of the balance (44,563*l.*), which amounted to 8968*l.*, and adding thereto his salary as partner (400*l.*) and interest on his capital (1561*l.*). In addition the appellant had, for the year in question, an income of 130*l.* from other sources.

The appellant contended that, in arriving at his income derived from partnership profits, his share of such profits should be computed on the basis of the actual amount received by him during the year preceding the year of assessment to super-tax, which was 3246*l.*; and that there was nothing in the sections of the Act imposing the super-tax which made the assessment, under Sched. D, on a firm for the preceding year a basis for the computation of the income of an individual partner for the purposes of the super-tax.

The Special Commissioners, being of opinion that the provisions of s. 66, sub-s. 2 (1), of the Finance (1909-10) Act, 1910, rendered it obligatory on them to include the said sum of 10,929*l.* in estimating the appellant's income for the purpose of the super-tax for the year ended April 5, 1910, confirmed the assessment in the sum of 8059*l.*

Ryde, K.C., and *Konstam*, for the appellant. The provisions relating to super-tax are contained in Part IV. of the Finance (1909-10) Act, 1910, and s. 96, sub-s. 4, provides that Part IV. is to be construed together with the Income Tax Acts, 1842 and 1853, and any other enactments relating to income tax. There-

Income Tax Acts, the income of the individual from the partnership for the year to which the claim relates may be treated separately for the purpose of any such exemption, relief, or abatement, and if so treated shall be deemed to be the share to which he is entitled during the said year in the partnership profits, such profits being estimated according to the several rules and directions of those Acts."

(1) 10 Edw. 7, c. 8, s. 66, sub-s. 2: "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; . . ."

fore r. 4 of Sched. D to s. 100, and s. 134 of the Income Tax Act, 1842, are introduced, and they shew that the assessment of the partnership profits cannot be conclusive in the assessment of the income of an individual partner, and therefore cannot be conclusive for the purposes of super-tax. It is impossible to apply such a principle to the assessment of a partner for the purposes of super-tax, for it would be quite unworkable and would lead to absurd results.

Sir Rufus Isaacs, A.-G., and *W. Finlay*, for the respondents, were not called upon to argue.

Cur. adv. vult.

July 29. (1) *HORRIDGE J.* The question for my decision turns upon the assessment for the year ending April 5, 1910. The system adopted in the assessment in question is to take the average of the three years' total profits of the firm for the three years ending April 5, 1908; to treat that as the assessment for the year 1908-9; and then to divide that amount by the actual proportion of the share to which the appellant was entitled during the year 1908-9.

It was contended before me that this was a wrong mode of assessment and that the proper course was to take the actual profits which the appellant had received out of the firm during the year 1908-9, which profits as appears from the case were 3246*l.*, as the true figure upon which the appellant ought to be assessed for super-tax for the year 1909-10.

By the Finance (1909-10) Act, 1910, s. 66, sub-s. 2, it is provided as follows: [His Lordship read the sub-section.] By s. 20 of the Finance Act, 1907, it is provided that in ascertaining the income of a partner for the purpose of exemption, relief, or abatement, "the income of the individual from the partnership for the year to which the claim relates may be treated separately for the purpose of any such exemption, relief, or abatement, and if so treated shall be deemed to be the share to which he is entitled during the said year in the partnership profits, such profits being estimated according to the several rules and directions of those Acts." It seems to me that the construction of the statute is

(1) The judgment was written,

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fairly clear, and that the Commissioners for Special Purposes in this case have ascertained it on correct principles. They have taken the actual share to which the appellant was entitled during the year and have divided in this proportion the profits of the firm on the average of three years ascertained in accordance with the provisions of the Income Tax Acts. I cannot see anything in the section which entitles them to look at the actual proportion of profits received by the separate partner for a single year. I think this appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Edgar Bogue, for Scott, Eames & Mossman, Bradford.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

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BROOKS, APPELLANT v. INLAND REVENUE
COMMISSIONERS, RESPONDENTS.

Revenue—Income Tax—Super-tax—Assessment—Assessment under Sched. D for previous Year not conclusive for Purposes of Super-tax—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 66, 72.

For the purpose of assessment to super-tax, under s. 66 of the Finance (1909-10) Act, 1910, the sum at which the taxpayer has been assessed to income tax under Sched. D for the year preceding the year of assessment to super-tax is not conclusive and binding on the Special Commissioners, and the taxpayer may prove what was in fact his income for such preceding year.

Wylie Hill v. Inland Revenue Commissioners, 1912 S. C. 1246, followed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax upon an appeal by Brooks against an assessment to the super-tax made upon him for the year ended April 5, 1910, in the sum of 8064*l.*, less the statutory allowance of 3000*l.*

The appellant had for several years carried on the business of waste dealer as sole proprietor thereof and had been assessed to income tax in respect of the profits derived therefrom; he was also in receipt of income from other sources. For the year ended

April 5, 1909, the appellant was assessed to income tax, Sched. D, in respect of the profits of such business in the sum of 400*l.* by first assessment and in the further sum of 3600*l.* by an additional first assessment, making altogether a total of 4000*l.* He appealed against the said additional first assessment of 3600*l.* to the Commissioners for General Purposes, who on May 9, 1910, determined as a matter of fact that the amount of the profits of the business on the average of the three preceding years and in accordance with the provisions of the Income Tax Acts was 6331*l.* As it appeared to the Commissioners that the appellant ought to have been charged and assessed to an amount beyond the sum of 4000*l.* as assessed, namely, on a total sum of 6331*l.*, they thereupon charged him in an additional sum, namely, 2331*l.*, making a total sum of 6331*l.*

The appellant did not demand a case under s. 59 of the Taxes Management Act, 1880, for the opinion of the High Court thereon as therein provided, and the duty on the assessment of 6331*l.* was duly paid by him.

On June 10, 1910, the Special Commissioners issued a notice to the appellant requiring him to make a return of his total income from all sources for the purposes of assessment to super-tax for the year ended April 5, 1910, in pursuance of s. 72, sub-s. 2, of the Finance (1909-10) Act, 1910, and he delivered a return in which he declared his income from the said business to be 400*l.* and his total income from all sources to be the sum of 2039*l.* 3*s.* 4*d.* The Special Commissioners were not satisfied with that return and accordingly made an assessment according to the best of their judgment, under s. 72, sub-s. 5, of the Act of 1910, in the sum of 8064*l.*, as including 6331*l.* in respect of the profits of his said business and 1733*l.* income from other sources.

The question arising in this case relates solely to the item of 6331*l.*; no question arises with reference to the balance (1733*l.*), which for the purposes of this case may be accepted as correct as forming part of the appellant's income.

The appellant at the hearing of his appeal against the said assessment to super-tax contended that the said assessment or charge amounting to 6331*l.* under Sched. D did not truly represent the assessable income of his said business, but was

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greatly in excess of such income, and that the over-assessment by the General Commissioners was in the nature of a penalty imposed by them in respect of alleged incorrect returns made by him for the purpose of assessment to income tax for several years prior to the year ended April 5, 1909, and he offered to adduce in evidence accounts relating to the business to shew what his actual income was from the business for the previous year, namely, for the year ended October 31, 1908, being the date immediately preceding April 5, 1909, to which the accounts of the business were made up.

On behalf of the Commissioners of Inland Revenue it was contended that the assessment or charge amounting to 6331*l.*, determined as aforesaid on appeal, for the year ended April 5, 1909, being the year previous to the year to which such super-tax assessment related, was to be taken to be the income of the appellant from that source for the purpose of super-tax for the year ended April 5, 1910.

Having duly considered the facts and the arguments adduced, the Special Commissioners did not accept the statements of the appellant and declined to receive the said accounts in evidence, being of opinion that those accounts were unnecessary and immaterial, the provisions of s. 66, sub-s. 2 (1), of the Act of

(1) 10 Edw. 7, c. 8:

Sect. 66: "(1.) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the 6th day of April, 1909, in respect of the income of any individual, the total of which from all sources exceeds 5000*l.*, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds 3000*l.*

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the

previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts;"

Sect. 72: "(1.) The super-tax shall be assessed and charged by the Commissioners for the Special Purposes of the Acts relating to Income Tax (in this Act referred to as the Special Commissioners).

"(5) If any person fails to make a return under this section, or if the Special Commissioners are not satisfied with any return made under this section, the Special Commissioners may make an assessment of the super-tax according to the best of their judgment."

1910 rendering it obligatory on them to regard the sum of 6331*l.* as the appellant's income from his business as for the purposes of the super-tax for the year ended April 5, 1910. They accordingly confirmed the assessment to the super-tax in the sum of 8064*l.*, less the statutory allowance of 3000*l.*

The question for the opinion of the Court was whether in the circumstances the provisions of s. 66, sub-s. 2, of the Act of 1910 rendered it obligatory on the Special Commissioners to regard the said sum of 6331*l.* as the appellant's income from his business for the purposes of the super-tax for the year ended April 5, 1910, and also whether the aforesaid proffered evidence was rightly rejected.

Brocklehurst, for the appellant. The assessment to income tax under Sched. D is not conclusive and binding upon the Special Commissioners for the purpose of the assessment to super-tax; they are bound to make an independent estimate, and cannot take the assessment to income tax if the appellant objects to it as incorrect. Super-tax is a separate and independent tax quite distinct from income tax and is governed by its own statutory code and rules. The provisions of s. 66, and of sub-ss. 1 and 5 of s. 72, of the Finance (1909-10) Act, 1910, shew clearly that the Special Commissioners are themselves bound to make an estimate and to make an assessment according to the best of their judgment. These provisions as to super-tax apply to Scotland, and it has been decided by the Court of Session in *Wylie Hill v. Inland Revenue Commissioners* (1) that a taxpayer, in making a return of his income for the previous year for the purpose of assessment to super-tax, was entitled to deduct losses sustained in husbandry which had not been claimed as deductions when he was assessed to income tax; and the ground of that decision, as stated by Lord Johnston (2), was that the assessment to income tax was not binding upon the Special Commissioners for the purpose of super-tax. That decision ought to be followed by a judge of first instance in England, as was stated by Swinfen Eady J. in *In re Hartland*. (3)

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(1) 1912 S. C. 1246.

(2) *Ibid.* at p. 1250.

(3) [1911] 1 Ch. 459, 466.

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Sir Rufus Isaacs, A.-G., and W. Finlay, for the respondents.

The decision in the case of *Wylie Hill v. Inland Revenue Commissioners* (1) was not a decision upon this point at all, but only as to the right to make certain statutory deductions for the purposes of super-tax. It is true that some of the observations of Lord Johnston seem to be contrary to the present contention on behalf of the Crown, but if they are in point they are merely obiter and in no way binding upon this Court. In *Attorney-General v. Till* (2) Cozens-Hardy M.R. declined to accept the decision of the Court of Session upon a revenue question.

From the provisions of s. 66 of the Act of 1910 it appears clearly that super-tax is merely an additional income tax and in no sense a separate and independent tax; and Parker J. so decided in *Bowles v. Attorney-General*. (3) By sub-s. 2 of s. 66 the total income, for the purposes of super-tax, is to be taken to be the total income for the previous year, estimated in the same manner as the total income is estimated for the purposes of exemptions or abatements under the Income Tax Acts; for these latter purposes the assessment under Sched. D to income tax is conclusive, and therefore is conclusive for the purposes of super-tax. By s. 57, sub-s. 10, of the Taxes Management Act, 1880, the decision of the General Commissioners upon an appeal against an assessment to income tax is final and conclusive; and ss. 163, 164, and 190, Sched. G, of the Income Tax Act, 1842, shew that for purposes of exemption the assessment to income tax under Sched. D is conclusive.

Brocklehurst, in reply. In *In re Hartland* (4) Parker J. was dealing only with the machinery of administration and collection in respect of super-tax and not with the principles upon which super-tax is to be assessed.

Cur. adv. vult.

July 30. (5) HORRIDGE J. In this case the Commissioners for Special Purposes in ascertaining the total income of the appellant for the purpose of super-tax have held themselves, as regards the

(1) 1912 S. C. 1246.

(3) [1912] 1 Ch. 123, 135, 136.

(2) [1909] 1 K. B. 694, 701.

(4) [1911] 1 Ch. 459.

(5) The judgment was written.

item of 6331*l.*, a portion of the total assessment, bound by the decision of the Commissioners for General Purposes holding that that amount was the amount in respect of which the appellant ought to be assessed as the profits of his business on the average of the three years preceding the year ending April 5, 1909. The substantial question, therefore, before me is whether or not in arriving at the total income for the purpose of super-tax the Special Commissioners are bound to accept the assessment under Sched. D of the General Commissioners for the Purposes of Income Tax at 1*s.* 2*d.* in the pound or whether they ought to inquire afresh and re-assess the appellant under that schedule.

There was a point made under paragraph 6 of the case that the appellant had only offered to adduce in evidence accounts relating to his business which shewed what his actual income from his business was for the previous year, and therefore in any event the Commissioners for Special Purposes would be entitled to say that this evidence was not relevant and that he ought to have tendered proper evidence of the average for three years. It was, without argument, conceded on behalf of the appellant that the evidence tendered was not the right evidence, and the Attorney-General consented not to press this objection and was willing, if I decided that the Special Commissioners were not bound by the decision of the General Commissioners, that the case should go back to the Special Commissioners to enable the appellant to tender proper evidence.

The argument on the main question on behalf of the appellant was that there is nothing in the provisions of the Finance (1909-10) Act, 1910, which makes the decision of the General Commissioners binding in respect of super-tax, and reliance was mainly placed upon the case of *Wylie Hill v. Inland Revenue Commissioners*. (1) On behalf of the Crown it was contended that super-tax is additional income tax, and that, as by s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, it is provided as follows [his Lordship read the sub-section], it is necessary to look at the manner in which income is estimated for the purpose of exemptions or abatements. The provisions with regard to

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exemptions from income tax are contained in s. 163 of the Income Tax Act, 1842, which provides that "such exemption shall be claimed and proved and the proceedings thereupon shall be had before the Commissioners for General Purposes in the district where the claimant shall reside, pursuant to and under the powers and provisions by which the duties in Schedule D are herein directed to be ascertained and charged, but nevertheless subject to the rules and directions hereinafter contained." Directions are contained in s. 164 of the same Act, which enacts that "every person claiming to be entitled to such exemption shall . . . deliver or cause to be delivered to the assessor of the parish or place where such claimant shall reside a notice of his claim for such exemption, together with a declaration and statement signed by such claimant and in such form as may be provided under the authority of this Act." By s. 190 of the same Act it is provided that the schedule marked G and the rules and directions therein contained are to be observed. By Sched. G, r. 17, a declaration is to be made of "the amount of value or property or profits returned or for which the claimant hath been or is liable to be assessed." The provisions with regard to abatement are contained in s. 8 of the Finance Act, 1898, and in the unrepealed portion of s. 28 of the Income Tax Act, 1853, the result of such sections being to put the assessment for the purposes of abatement on the same footing as for the purposes of exemption.

The contention on behalf of the Crown was, therefore, this. Super-tax is a further income tax, and the assessment for the purpose of the super-tax has to be estimated in the same manner as income is estimated for the purpose of exemption or abatement under the Income Tax Acts; and, therefore, there being in effect one tax, namely, the income tax, the Acts must be read in such manner as to hold that an assessment once made under Sched. D for the purpose of income tax must be available and conclusive for all purposes, including the purposes of the further income tax. Further, it was pointed out that the persons who fix the assessment for the purpose of Sched. D are the General Commissioners for the district where the trade, manufacture, adventure, or concern is carried on, or the pro-

fession, employment, or vocation exercised, and it cannot have been intended that the Special Commissioners should have the power to revise the decision of such a body.

If the decision of the General Commissioners is to be treated as being made for the purposes of super-tax, it seems clear that under s. 57, sub-s. 10, of the Taxes Management Act, 1880, their decision would be final.

I have set out the above contentions with a view to shewing the question which was raised for my decision so as to ascertain whether or not the point is directly covered by the decision in *Wylie Hill v. Inland Revenue Commissioners*. (1)

There are I think clearly in the judgment of Lord Johnston statements which conclude the question. He says (2): "Nor is there anything to indicate that the Special Commissioners are bound by the previous assessments or barred from going behind them"; and, referring to the words of sub-s. 2 of s. 66, "it is to be estimated, not is to be taken as it has been estimated, and accordingly an estimate in 'manner' prescribed is required." Further, he uses the following language: "That super-tax and everything connected with it is something quite apart from income tax is, if it were necessary, clearly shewn by the four special rules which are appended to the sub-s. 2 (of s. 66) which I have just examined. I, therefore, think that the Special Commissioners are bound to consider the appellant's demand for deduction in respect of his farming losses."

As regards the decision, it is quite true that it is a decision with respect to an application for a deduction to be allowed from an assessment for income tax made by the General Commissioners which has not been applied for within the proper time so as to obtain relief as regards the assessment for income tax as distinguished from super-tax; but it is a decision of a full Court that the assessment for the purpose of income tax, as distinguished from super-tax, is not binding upon the Special Commissioners in making their assessment for the purposes of super-tax.

In answer to this case the judgment of Parker J. in *Bowles v. Attorney-General* (3) was strongly pressed upon me, but I

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(1) 1912 S. C. 1246.

(2) Ibid. at p. 1250.

(3) [1912] 1 Ch. 123.

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think that, although that decision does decide that super-tax is in fact an income tax, it merely decides that being an additional income tax it is within the words "duties of income tax" within the meaning of s. 30 of the Customs and Inland Revenue Act, 1890, and it does not seem to me to be a decision directly on the point which I have to decide.

In the case of *In re Hartland* (1) Swinfen Eady J. says: "Where the exact point has been raised by a special case and fully argued and decided by an unanimous judgment of the Court of Session, and where the question is simply one that turns upon the construction of a statute which extends to Scotland as well as to England, I think my duty as a judge of first instance is to follow that decision, leaving the parties if so advised to have it reviewed elsewhere." The Finance (1909-10) Act, 1910, is a statute which extends to Scotland as well as to England, and the decision of the Court of Session was an unanimous judgment of Lord Johnston, the Lord President, and Lord Kinnear. It seems to me to deal expressly with the point raised for my decision in this case, and I feel it is my duty, without expressing my view of the point dealt with, to hold that this appeal ought to be allowed and the case remitted to the Special Commissioners.

Appeal allowed.

Solicitors for appellant: *Rawle, Johnstone & Co., for Hardicker & Hanson, Manchester.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1911] 1 Ch. 459, 466.

J. H. W.

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July 2, 3.

[1905 K. 1151.]

Insurance (Marine)—Insurance of Cargo against Capture—Constructive Total Loss—Anticipation of Capture—Sale of Cargo by Assured.

By a policy of marine insurance the plaintiffs, who were Russian subjects, insured a cargo of salt beef with the defendants at and from San Francisco to Vladivostok against (inter alia) capture. During the currency of the policy war between Russia and Japan broke out, and the Japanese fleet was in the Pacific and was stopping and capturing vessels. The Japanese were also blockading Vladivostok. The defendants telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs' representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, and ultimately notice of abandonment was given to the underwriters, who refused to accept it.

Held, that the fact that it was anticipated that if the cargo went forward it would be lost by capture did not in the circumstances constitute a constructive total loss, inasmuch as the actual cause which must eventually have produced the peril insured against had not begun to operate.

The Knight of St. Michael [1898] P. 30, and *Butler v. Wildman* (1820) 3 B. & Ald. 398, distinguished.

ACTION tried in the Commercial Court before Pickford J. without a jury.

The action was brought by the plaintiffs, Russian subjects residing in the Empire of Russia and carrying on a general import business at various places in Russia and Siberia, against the defendants, a joint stock company carrying on business at Cornhill, to recover a loss under a policy of marine insurance dated December 16, 1903, for 3000*l.* part of 9000*l.* on cargo per steamer or steamers at and from San Francisco to Vladivostok.

The policy was expressed to be against war risk only, being in terms against the risk excepted by the clause "warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, and also from all consequences of hostilities

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or warlike operations, whether before or after declaration of war.” The plaintiffs had arranged for three shipments, one being to Vladivostok, the second to Port Arthur, and the third, with which alone this action was concerned, to Vladivostok via Nagasaki. The first two shipments were made, but the vessels carrying the cargoes were captured by the Japanese who were blockading Vladivostok during the war between Russia and Japan. The insurances in these cases were duly paid. The steamer which was to carry the particular cargo—a large consignment of salt beef—was to have left San Francisco on February 26, 1904, for Vladivostok via Nagasaki. At the time she was about to sail, and when some of the cargo was on board, it was known that the Japanese fleet was in the Pacific and was stopping and capturing vessels. The underwriters (including the defendants) telegraphed to the plaintiffs to the effect that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs deliberately caused any loss occasioned by the perils insured against. The plaintiffs’ representatives in San Francisco, who were not desirous of increasing the loss to the underwriters, proposed that the cargo should be discharged at San Francisco and sold elsewhere, and ultimately notice of abandonment was given to the underwriters, who refused to accept it, but agreed that the plaintiffs should be placed in the same position as if a writ had been issued and an action commenced immediately after the refusal of the notice of abandonment. The cargo was then discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs brought this action claiming the value of the cargo, but giving credit for the salvage realized by the sale at Shanghai. The only question material to this report was whether in the circumstances there had been (as the plaintiffs contended) a constructive total loss of the cargo. The defendants contended that there had been no loss by a peril insured against.

F. D. Mackinnon (Maurice Hill, K.C., with him), for the plaintiffs. There was a constructive total loss of the cargo by the perils insured against. In the circumstances the loss must be regarded as a loss by capture. It was reasonably certain that if the cargo had been sent to Vladivostok it would have been

captured, and the case is therefore governed by *The Knight of St. Michael*. (1)

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Leslie Scott, K.C., and Leck, K.C., for the defendants. The question is not whether the cargo was commercially lost in consequence of the fear of capture, but whether there was a loss by capture. What happened was due to the voluntary act of the assured as the result of one of two fears—fear of capture or fear that if the cargo was captured the underwriters would repudiate liability.

The Knight of St. Michael (1) is distinguishable. In that case the policy contained the usual general words. In the present policy there are no general words.

F. D. Mackinnon in reply. The point that this was a loss by the act of the assured could equally have been taken in *Jackson v. Union Marine Insurance Co.* (2) The decision in *Hadkinson v. Robinson* (3) is irreconcilable with that in *The Knight of St. Michael* (1) and *Butler v. Wildman*. (4) The present case is distinguishable from *Hadkinson v. Robinson*. (3) In that case there was no communication with the underwriters, nor were they placed in the dilemma in which the plaintiffs were by the action of the defendants.

PICKFORD J. The question is whether there was a loss by the perils insured against. That depends upon whether there was a constructive total loss at the time of the abandonment. At the time of the abandonment the position was this. The Japanese war had broken out. The Japanese were blockading Vladivostok, and soon afterwards they captured the vessels carrying the first two shipments. It is a considerable distance from San Francisco to Vladivostok or to any place where the Japanese fleet was. It was anticipated that if the cargo was sent forward it would almost certainly be captured by the Japanese. In that state of facts, can I say that the cargo then lying in the ship at San Francisco was constructively totally lost by capture—any future supposed captor being probably many hundreds, if not thousands, of miles away at the time, but it being anticipated that if the

(1) [1898] P. 30.

(2) (1874) L. R. 10 C. P. 125.

(3) (1803) 3 Bos. & P. 388.

(4) 3 B. & Ald. 398.

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cargo was sent on it would fall into the hands of those captors? It seems to me that to hold that that cargo was then constructively totally lost would be to go beyond any of the authorities which have been cited to me. I do not think it is possible, as a pure matter of fact or law, to say that that cargo was then lost by capture; it was anticipated that it would be so lost. The nearest case to the present one which has been cited to me is *The Knight of St. Michael* (1). I do not think it is necessary for me to consider whether *The Knight of St. Michael* (1) overrules *Hadkinson v. Robinson* (2), as *The Knight of St. Michael* (1) is different from the present case. It differs first with regard to the use of the general words. I am not satisfied that I ought to read general words into this policy. But even if I ought there is still the difference that although in *The Knight of St. Michael* (1) fire had not absolutely broken out at the time, the heat which was the preliminary stage of fire had already come into existence, and it seems to me that in order to bring the present case within *The Knight of St. Michael* (1) it would be necessary to place the parties in the position of those in *Butler v. Wildman* (3), where the ship which jettisoned some of its cargo was actually being pursued at the time by a hostile vessel which eventually captured it. I do not express any opinion as to whether that would amount to a constructive total loss or not; I only say that if that position existed, the present case might come within the principle of *The Knight of St. Michael* (1), where the cause had begun to operate,—the actual cause which must eventually have produced the peril insured against—and when I say “had begun to operate” I mean that the actual cause had begun to operate directly upon the subject-matter of the insurance. In my judgment the present case is a long way off that position, and it is quite impossible for me to hold that the cargo was constructively totally lost because if it had been sent upon the voyage there was every reason to think it would have been lost by reason of the perils insured against. I do not think that the present case can be put higher than that, and in my judgment, therefore, the cargo was

(1) [1898] P. 39.

(2) 3 Bos. & P. 388.

(3) 3 B. & Ald. 398.

not constructively totally lost at the time that it was abandoned ; partial loss will not avail the plaintiffs, because the policy was against total loss only, and unless there was a constructive total loss at the time of abandonment the plaintiffs cannot succeed. For these reasons I hold that there was not a constructive total loss and that the assured cannot succeed in this action. There must therefore be judgment for the defendants.

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Judgment for defendants.

Solicitors for plaintiffs : *T. Cooper & Co.*

Solicitors for defendants : *Waltons & Co.*

J. E. A.

[IN THE COURT OF APPEAL.]

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June 5, 6.

Insurance (Plate Glass)—Damage “caused directly by or arising from civil commotion or rioting”—Breaking Windows.

An organized conspiracy to commit criminal acts, without more, does not amount to “civil commotion.”

By a policy of re-insurance, underwritten by the defendant, the plaintiffs were insured against “damage to plate glass caused directly by or arising from civil commotion or rioting.” During the currency of the policy a large number of women in different parts of London simultaneously broke windows with hammers. Each woman, when arrested, went quietly to the police station ; there was no disturbance in the street and no public sympathy was shewn for the women who broke the windows. No one of the women was charged with riot or unlawful assembly ; the charge in each case was one of malicious injury, and each case was dealt with separately without any charge being preferred of acting in concert with others :—

Held, that there was no evidence that the damage was caused directly by or arose from civil commotion or rioting, and that the defendant was not liable on the policy.

Held, further, that the fact that the defendant had previously paid under another policy in the same words under similar circumstances did not estop him from raising the defence that the damage was not caused by civil commotion or rioting.

Decision of Bucknill J. affirmed.

APPEAL of the plaintiffs from a decision of Bucknill J. withdrawing the case from the jury.

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The facts shewed that the plaintiffs issued policies of insurance against injury to plate glass windows in London. They had re-insured their risks for some years past at Lloyd's, and in November, 1911, when considerable damage had been done to plate glass windows by militant suffragists, they had made a claim under their then policy (which was similar in terms to the policy now sued upon), which had been paid by the defendant without objection. In February, 1912, they renewed their policy at Lloyd's, increasing the amount insured against. In March, 1912, a large number of women simultaneously broke plate glass windows in different quarters of London; each woman when arrested went quietly to the police station, there was no disturbance in the streets, and no sympathy was shewn for the women by the public; also, no one of the women was charged with riot or unlawful assembly; the charge in each case was one of malicious injury, and each case was dealt with separately without any charge being preferred of acting in concert with others. The plaintiffs had to pay large sums of money to their clients for damage done to their windows, and it was these sums which they now sought to recover from the defendant under their policy of re-insurance.

Bucknill J. held that there was no evidence that the damage was caused directly by or arose from civil commotion or rioting, and gave judgment for the defendant.

The plaintiffs appealed.

J. H. Watts (Rawlinson, K.C., and Whately with him), for the plaintiffs. The facts shew that there was a contract of re-insurance and payment under it, and then an increased insurance to meet this particular risk. The police were called in the Court below, and said that in one district fifty-four windows were broken and twenty women arrested, of whom eighteen had hammers in their possession, and that in a second district 152 windows were broken and eighty women arrested. There was a conspiracy to break windows, in pursuance of which windows were broken; it was a civil commotion. No strictly technical meaning can be given to the words "civil commotion," but they include public disorder or disturbance, which covers a state of

affairs in which the police anticipate a breach of the peace and make arrests to prevent it, while there is considerable destruction of property. A civil commotion is a step before you get to a riot. It is a question for the jury to say whether the state of affairs existing on a particular night amounted to a civil commotion. In *Langdale v. Mason* (1), in which the question of civil commotion arose, Lord Mansfield said: "Though this be so guarded, the Sun Fire Office did not think it suited their purpose; and therefore they took the words civil commotion . . . I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power." That case went to the jury, who found that there had been a civil commotion. In the present case the window-breaking broke out in different places at the same time, and there was the strongest evidence of concerted origin. It is also worthy of observation that all the women charged were bailed out by the same person. Having regard to the number of premises injured and the number of persons arrested there was some evidence of a civil commotion to go to the jury. In the *Century Dictionary* "commotion" is described (inter alia) as "political or social disturbance"; there was evidence in the present case that the women were all members of a political association. The fact that Lloyd's paid the first claim is significant; by paying they induced the plaintiffs to take out a policy for an increased amount. The civil commotion may be the breaking of the windows itself; if 200 women went to one place and broke windows, it would be civil commotion. There was evidence of conspiracy; there was an assemblage to do illegal acts, and they went on to the next step of civil commotion.

Clavell Salter, K.C. (*Grimwood Mears* with him), for the defendant. The argument for the plaintiffs contains two main flaws; first, it omits to pay any attention to the adjective "civil" in the expression "civil commotion"; and, secondly, assuming that there was civil commotion, there is no evidence that it caused the breaking of the windows; on the other hand, it was the breaking of the windows that caused the civil commotion.

(1) (1780) 2 Park on Insurance, 965.

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 1913 force is a main element, and that is wholly lacking here. The
 LONDON AND MANCHESTER evidence was of three police inspectors, who came on the scene
 PLATE GLASS COMPANY, LIMITED an hour after the breakage, and found no crowd, no resistance to
 v. arrest, no attempt at rescue, and no tumult, disorder, or violence
 HEATH. of any sort or kind. There was no evidence that the women ever
 assembled at all, though of course there was ample evidence of
 concert. It is material to see what view the authorities took of
 the affair. The women were not charged with riot or with
 unlawful assembly, but each woman was charged with malicious
 injury and each was convicted. To sum up, there was a complete
 absence of opposition of physical force; any civil commotion
 there may have been was caused by the window-breaking, not
 the window-breaking by civil commotion, and the fact that the
 first claim was paid is no estoppel on the defendants. [He also
 cited *Field v. Receiver of Metropolitan Police*. (1)]

Whately in reply. *Langdale v. Mason* (2) is the only case in
 which a construction has been put upon the words "civil com-
 motion" when occurring in a policy, and it is important to see
 what was actually decided there. The actual words in the policy
 in that case were "invasion, foreign enemy, civil commotion, or
 military or usurped power." There are no such words in the
 present case. Bucknill J. has read into the present policy the
 words about "usurped power" from *Langdale v. Mason*. (2) The
 damage was caused directly by civil commotion, caused by a
 combination of women committing acts which amounted to a
 public disturbance.

[BUCKLEY L.J. Your view is that a conspiracy to commit acts
 of violence is a civil commotion.]

Certainly, as soon as it is put into force.

VAUGHAN WILLIAMS L.J. read the following judgment:—This
 is an appeal of the plaintiffs from the judgment of Bucknill J.,
 sitting without a jury, (the learned judge having withdrawn the
 case from the jury) in a case in which the London and
 Manchester Plate Glass Company, Limited, are the plaintiffs
 and Mr. Heath is the defendant.

(1) [1907] 2 K. B. 853.

(2) 2 Park on Insurance, 965.

The claim of the plaintiff company is for the sum of 237*l.* 16*s.* 4*d.* under a policy of insurance made between the plaintiffs and the defendant acting on behalf of himself and all those others named in the said policy of insurance, which bears date February 13, 1912. The action, I understand, is a test action, there being many similar policies in which practically identical claims are made.

The claim of the plaintiff company is on a policy underwritten by members of Lloyd's only to insure "against loss as follows, viz:—against damage to plate glass caused directly by or arising from civil commotion or rioting at various places in London, &c., as per schedule attached" during a specified period. The defence of Mr. Heath on behalf of the underwriters in substance is that if the said or any damage was suffered by the plaintiffs as alleged the same was not caused directly by, nor did it arise from, civil commotion or rioting, and this appeal really depends on the meaning of the words "civil commotion or rioting."

Mr. Rawlinson, who has appeared before us for the appellant plaintiffs, has based his argument chiefly on the meaning of the words "civil commotion," but I do not think that he has formally abandoned the contention that the occasion on which the plate glass windows were broken or damaged was rioting, but it appears from the judgment of the learned judge that before him the contention as to the word "rioting" was dropped, and he says "it is clear, I think, beyond all argument that this was not rioting." Bucknill J. asks himself the question, "Is the evidence such as to make it a case to go before the jury on the question of civil commotion," and says, "Now in construing the document it is for the Court to construe a document in the first instance. I have to ask myself what the context was. The context was, as I have just pointed out, 'civil commotion' or rioting.' 'Civil commotion' means, as I understand it, that which Lord Mansfield says it means, and I adopt his expression. He said in *Langdale v. Mason*, reported in 2 Park on Insurance, 965, 968, where he asked himself this question, 'I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is usurped power.' That is the definition

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which I adopt. There"—that is in the case before Lord Mansfield—"it was clearly a case for the jury, because the facts were such in that case as to make it a vexed question whether it was a civil commotion or whether it was a rebellion or, perhaps I have not stated it sufficiently, whether it was a riot. But one could not hear those facts recited without coming to the conclusion that that was nothing at all like this; that there was a general rising up of the people to do terrible things and terrible things were done even to the attacking of the Bank of England. Therefore Lord Mansfield, that very learned judge, was driven to ask the jury the question whether the facts which were proved amounted either to a rebellion or to civil commotion or what they were."

In the words which I have quoted one finds the principle which Bucknill J. has adopted from the summing up of Lord Mansfield. The question which this Court has to consider is whether on the evidence before Bucknill J. the case ought to have been left to the jury as a question of fact or whether on the evidence Bucknill J. was right in holding that there was no evidence upon which a jury would be justified in finding that there was in this case civil commotion.

If it was a question of degree of commotion, it clearly would be a question for the jury; but if the definition of "civil commotion" by Lord Mansfield is always to limit the meaning of the words "civil commotion," notwithstanding any change by the people of this country in the manner of asserting what they conceive to be their rights, then it is plain that in this case there has been no insurrection of the people for the purpose of general mischief, though not amounting to rebellion. That the method of asserting such rights by violence of some sort is very different from what it was in the time of Lord Mansfield, I have no doubt—such violent methods are not limited to the violence of "suffragettes." It may be answered that these words have come in insurance policies to have a fixed meaning or a fixed construction—and I think this is true—and somewhat reluctantly I have come to the conclusion that this appeal must be dismissed.

As to the second policy entered into after a payment on a previous policy in which the same words were used—"civil commotion or rioting"—I think there is nothing in this point. There

is clearly no estoppel. If words are ambiguous, sometimes the construction put upon them by the contracting parties may be given in evidence; but for reasons I have given these words in policies of insurance cannot be held to be ambiguous.

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BUCKLEY L.J. read the following judgment:—The plaintiffs sue the defendant upon a policy insuring the plaintiffs against damage to plate glass caused directly by or arising from civil commotion or rioting. The question for determination arises upon the words “civil commotion,” and is whether such evidence was adduced as that it was the duty of the judge, after giving the jury a proper direction as to what constitutes a civil commotion, to leave it to them to say whether there was or was not “civil commotion.” The plate glass in question was broken in Oxford Street, the Strand, Piccadilly, the Haymarket, and Regent Street by women who, the defendant says, were “suffragettes.” There is no need to express an opinion upon the general question whether the organized “suffragette” movement, which has become so notorious, is, or may beget or become, civil commotion. The question is a simpler one, namely, whether upon the evidence in this case such facts have been shewn as that the judge ought to have left to the jury the question above stated. There was ample evidence upon which it might have been found that there was an organized conspiracy to commit criminal acts. There was ample evidence of a united purpose. There was no evidence what was the purpose or object of the conspiracy. There was no evidence of public disturbance or tumult. There was no evidence of assault. There was no evidence of assemblage. No one of the women was charged with riot or with unlawful assembly. The charge in each case was malicious injury, and each case was dealt with separately without any charge being preferred of acting in concert with others. Under these circumstances was there any evidence of civil commotion?

Commotion connotes turbulence or tumult and, I think, violence or intention to commit violence. The evidence given is evidence of a number of separate criminal acts committed by violence in the sense that a hammer was used to break a window but without violence or intention to commit violence in the sense of assault

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upon any one. The acts were in fact done without causing any tumult or disturbance. This does not in my opinion disclose a state of facts upon which it could be found that there was civil commotion. The words of the policy are "caused directly by or arising from civil commotion or rioting." The breaking of the glass did not arise from civil commotion. There was, at the moment of breakage at any rate, no commotion other than the breakage of the glass. The act was done deliberately but quietly. Then was the damage caused directly by civil commotion? To satisfy these words, there must have been civil commotion before the breakage. There was none, unless it can be maintained that an organized conspiracy to commit criminal acts amounts without more to civil commotion. In my opinion it does not. In the absence of any evidence as to disturbance or tumult, there was, I think, no question to go to the jury whether there was a civil commotion or not.

Upon the other question, as to estoppel, I scarcely think it necessary to add anything. It was the fact that, under a policy containing similar words, the assurer upon a previous occasion paid without demur. That, of course, did not establish that the payer was liable in respect of that for which he made payment. It remained for decision whether he was liable or not. Neither did it amount to an estoppel; there was no estoppel and nothing to assist in the determination of the question but the document. There is nothing in that point.

For these reasons I think this appeal fails and must be dismissed with costs.

HAMILTON L.J. I agree.

As regards the second point, there was no evidence of estoppel, there was no evidence of a course of business; there is no ambiguity in the words except in the sense in which a difficulty of construction may be said to cause ambiguity, which does not let in evidence. There is no technical term or term of art in the policy, and there is, therefore, no ground whatever for contending that the issue of this case can be affected by what was done or left undone under the previous year's re-insurance policy.

As regards the main question, I agree there was no evidence

at all to go to the jury of damage caused by perils insured against. It is important to notice that the cases covered by the insurance are certain selected cases in the schedule attached to the re-insurance policy which occurred in five different thoroughfares, no doubt near together, but not in sight of one another—80, Strand, 68, Piccadilly, 24, Haymarket, 169, Regent Street, and 240—246, even numbers, inclusive, Oxford Street. Each one of those might have been the subject of a separate claim upon the policy. Each one of those was separately proved by a witness. Phillips, at 80, Strand, proved that G. Wilson broke the window. He said that he saw another window being broken, and he heard other windows being broken, but he says that that was after the window at 80, Strand was broken. The case of 68, Piccadilly is proved by Clay, who proves that Alice Farmer committed the offence there, and he says that he witnessed another attempt next door, where a woman tried to break a window. That again is after the breaking of his own window. At 24, Haymarket Mr. Handley is the witness. What he says is that he heard his window broken and a lady was pointed out as having broken the window, and he does not speak to any other windows being broken within his own knowledge. At 169, Regent Street Mr. Entwisle proves the breakage of the window, and he says that in addition to the window at his own premises a window had been broken at adjoining premises, and quite a number of windows were broken up and down the street, but he does not say whether the one that he proves, that is, the subject-matter of this claim, was after any or all of these, and for anything he knows it may have been the first. At Oxford Street the witness is Mr. Douglas. Miss Terrero broke all the four windows, and the witness says that he saw that other windows were broken, but he does not say, nor does he know, whether they were broken before or after his own windows.

The police proved many windows broken, but not having been on the spot are quite unable to say which windows were broken first.

Now in that state of affairs, remembering that this claim is for damage caused directly by or arising from civil commotion, and bearing in mind that it is the evidence of all the witnesses that

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Bucknill J. rested his decision upon the decision of Lord Mansfield in *Langdale's Case* (1), and I agree in the view that has been expressed with regard to that case. It has been pointed out to us very properly by Mr. Whately that the words in *Langdale v. Mason* (1)—“civil commotion”—occur not in a clause defining the perils insured against, but in a clause excepting certain perils out of those that are insured against; also that the collocation is special because the other excepted perils are “invasion, foreign enemy, or any military or usurped power whatever.” No doubt the observation is just. Here, however, one must remember that there is the collocation of “civil commotion” with “rioting,” and in so far as collocation assists at all, that indicates that there is some common feature between civil commotion and rioting, just as there was between invasion, foreign enemy, and military or usurped power, in *Langdale v. Mason*. (1) It would certainly be most undesirable to cast any doubt, unless one were constrained to do it, upon the view expressed by so great an authority as Lord Mansfield in *Langdale v. Mason* (1), especially having regard to the fact that the clause in fire policies which was before the Court in that case in 1780 has continued to be a common clause in fire policies down to the present time, and has, so far as I can trace it, uniformly been regarded as having had its meaning authoritatively settled by Lord Mansfield. And that is so both in the United States and in this country. I find that in May on Insurance, the 2nd edition of 1882, it is so treated in s. 403, and the authority of *Spruill v. North Carolina Mutual Life Insurance Co.* (2) is cited for that view. In *Bunyon on Fire Insurance*, the

(1) 2 Park on Insurance, 965.

(2) 1 Jones, North Carolina Reports, at p. 126.

edition of 1913, the same view is taken, and I find it continues to be taken in the profession as recently as Welford and Otter Barry's work on Fire Insurance, which is quite new. One would, therefore, be very loth to suppose that an understanding so long accepted in business and in the profession should be shaken. As a matter of fact the reasoning of Lord Mansfield appears to me to be quite unshakable, and he says quite clearly, "I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants; if not"—so that it was the point of his decision—"you will find for the plaintiff." Now in this case, whatever else one might call this raid, insurrection would be the last word, I think, to apply to it. Common purpose to break windows; ulterior common purpose, which it is difficult to comprehend, but no doubt in the case of quasi-rational beings some ulterior common purpose. Common action, sallying forth at the same time with the same implements to do malicious damage in the same neighbourhood and in the same manner; bail furnished by the same person in many cases; the same address given by the criminals in many cases, and, I may add, the charge always the same, that of a separate crime, and the result always the same, that of conviction, followed with more or less endurance of the punishment. Now the community of the participants in this raid is a community of plan, but as far as the evidence goes the operations are separate, and I cannot think that the word "insurrection," or any idea comparable to the word "insurrection," can possibly be applied to such a case as that. I think that a civil commotion, without making any attempt to define it, must at least involve that the acts which constitute the commotion should be acts done by the agents together, and not merely acts which are done in preconcert and simultaneously and in proximity to one another, and where there has been no tumult and no disturbance until after the acts, those acts themselves cannot constitute civil commotion, though the subsequent uproar might or might not in itself be a civil commotion; but as the damage

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1913 but by the actual breaking of the windows, that view is quite immaterial.

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I only desire to add that the only other authority in which this phrase appears to have been considered, *The Village Belle* (1), which is an admiralty case, turns not upon the meaning of the words "civil commotion," but upon the connection of the cause and effect between the delay of the vessel and the civil commotion, and therefore throws no light on the present case.

I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiffs: *C. R. Enever.*

Solicitors for defendant: *Barlow, Barlow & Lydc.*

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[IN THE COURT OF APPEAL.]

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March 6, 7 ;
June 18.

NORTH-WESTERN SALT COMPANY, LIMITED v.
ELECTROLYTIC ALKALI COMPANY, LIMITED.

Contract—Restraint of Trade—Illegality not pleaded—Duty of Court.

The plaintiffs agreed to buy from the defendants 72,000 tons of salt to be manufactured by the defendants; the agreement was by a contract in writing which the majority of the Court of Appeal held to be on the face of it illegal and unenforceable, as being in restraint of trade. The plaintiffs sued the defendants for breaches of the contract; the defendants in their defence did not plead the illegality of the contract:—

Held, that in order to raise the question of the illegality of the contract it was not necessary that the defence of illegality should be pleaded, the Court being bound to deal with illegality apparent on the face of the contract.

APPEAL by the defendants from a decision of Scrutton J. in an action tried by him without a jury. The facts, so far as material for the purposes of this report, were shortly as follows.

The plaintiffs were an amalgamation of salt manufacturers comprising most of the salt manufacturers in the West of England,

and the defendants were manufacturers of (inter alia) salt at Middlewich. The plaintiffs' claim was for damages for breach of a contract for and in connection with the sale and purchase of salt by which the plaintiffs agreed to buy from the defendants 72,000 tons of salt to be manufactured by the defendants and delivered by them to the plaintiffs over a period of four years from January 1, 1908, to December 31, 1911. By the contract it was provided that the defendants should not manufacture salt beyond the amount agreed to be delivered to the plaintiffs, and a certain quantity which was deliverable under an existing contract with a third party, and such further quantity as the defendants might require for their own use but not for sale. The defendants bound themselves during the four years not to sell or dispose of any of their land for saltmaking purposes. The alleged breach of contract, which was proved, was the sale by the defendants of salt during the four years to the public.

The defendants in their defence did not plead the illegality of the contract, and when the point was taken at the trial Scrutton J. refused leave to amend their defence in this respect. Scrutton J. held that the contract was not illegal as being in restraint of trade, and gave judgment for the plaintiffs.

The defendants appealed, and this report is confined to the question whether, in spite of the fact that the illegality of the contract was not pleaded, the Court was bound to deal with the question of illegality.

Maurice Hill, K.C., and *McCardie*, for the defendants, the appellants.

Atkin, K.C., and *J. D. Crawford*, for the plaintiffs, the respondents.

June 18. VAUGHAN WILLIAMS L.J. [After stating the facts of the case at length, the learned judge proceeded:] It cannot be denied that both these documents were put in evidence, and put in evidence by the plaintiffs. It is said on behalf of the plaintiffs that such documents were by no means essential to, or necessary for, the proof of the case of the plaintiffs, which was simply a claim for damages for breach of a contract for and in connection

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with a sale and purchase of salt; and that, even if such documents disclosed illegality as being in restraint of trade and for the purpose of establishing a monopoly, no such defence was pleaded. I do not think that to raise a question of illegality it is necessary that the defence of illegality should be pleaded, for the Court is bound to deal with illegality of its own motion, and it matters not one bit which side puts in the document disclosing illegality; nor does the purpose matter for which the document was put in. The only material point is that the contract for the breach of which this action was brought flows out of, or is controlled by, the documents put in evidence, which enable one to ascertain the nature of the business in respect of which the restrictive covenants are taken, and thus to judge as to how far such restrictive covenants afford merely reasonable protection to such business. [The learned Lord Justice proceeded to give his reasons for coming to the conclusion that the agreement sued on was illegal in the sense of being unenforceable as being in restraint of trade.]

FARWELL L.J. [After discussing the nature of the contract in question, his Lordship proceeded:] I am therefore of opinion that this contract with the defendants is in restraint of trade and unlawful in the sense that it cannot be enforced. I am not sure whether Scrutton J. intended to hold that it was or was not unlawful. He appears to have decided against the defendants on the ground that the illegality of the contract ought to have been pleaded, and he even refused leave to amend; in my opinion he was wrong in so doing. When it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection. This was so decided by Lord Mansfield in *Holman v. Johnson* (1), at law, and by Lord Eldon in *Evans v. Richardson* (2), and has been consistently acted on ever since, *Scott v. Brown & Co.*, *Slaughter & May v. Brown & Co.* (3), being one of the last cases.

The nature of the pleadings was therefore immaterial, and

(1) (1775) 1 Cowp. 341.

(2) (1817) 3 Mer. 469.

(3) [1892] 2 Q. B. 724.

the judge ought himself to have taken the objection. But, as the point of pleading is of some importance and was strenuously argued, I propose to state my opinion on it. Order XIX., r. 4, provides that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies"—i.e., the pleader must plead facts, not law, and must not plead the evidence in support of his facts. Rule 15 provides: "The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds." The "matters" therein mentioned are matters of fact, as provided by r. 4. Rule 15 does not abrogate or limit r. 4, but points out that certain facts must be pleaded if certain points are to be raised; if the contract sued on is *ex facie* illegal or void there are no facts to plead and the defendants are not bound to plead that it is illegal, because that is law, not fact; but if it is not so *ex facie* and he desires to raise the plea on facts *ultra*, they must plead those facts. The whole argument of the plaintiffs rests on a dictum attributed to Brett L.J. in *Clarke v. Callow* (1), which, if correctly reported, is obviously founded on a misapprehension of the practice in Chancery. The question arose as to the Statute of Frauds; Mellish L.J. stated that Order XIX. was intended to introduce in all Courts the practice of the Court of Chancery; Brett L.J. agreed that it was intended to assimilate the practice at law and in equity, and, after correctly stating that the Statute of Frauds had been pleaded, he added: "or if he means to deny the legality of a contract he has entered into, he must say so in plain terms." With all respect this is not in accordance with the old practice in Chancery, where the objection was apparent on the face of the bill; although, if it was not so apparent, the

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facts necessary to support it were raised by plea. The practice relating to pleas will be found in Mitford on Pleadings, 5th ed., pp. 257—356, and at p. 301 will be found the five pleas in bar of matter in pais of which the Statute of Frauds forms one, because it generally requires negative averments. But where the defect was apparent on the face of the bill, a plea would have failed and been dismissed with costs: Daniell's Chancery Practice, i., 484, 485. Such a defence could be raised on demurrer or on the hearing, and the fact that it might have been taken on demurrer and so have saved the costs of the hearing was no ground for depriving a successful plaintiff of his costs: *Bush v. Trowbridge Waterworks Co.* (1) I have gone into the point at some length because Brett L.J.'s declaration appears to have got into some of the books of practice, but the point was really decided in *Scott v. Brown*. (2)

I am therefore of opinion that the appeal succeeds, and that the action should be dismissed with costs here and below.

KENNEDY L.J., differing from the majority of the Court as to the illegality of the contract, did not deliver judgment on the point.

Appeal allowed.

Solicitors for plaintiffs: *Crump, Sprott & Co., for Archer, Parkin & Archer, Stockton-on-Tees.*

Solicitors for defendants: *Field, Roscoe & Co., for Alsop, Stevens, Crooks & Co., Liverpool.*

(1) (1875) L. R. 10 Ch. 459, 461.

(2) [1892] 2 Q. B. 724.

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WATNEY, COMBE, REID & CO., LIMITED *v.* BERNERS.1913
July 4.

Revenue—Licensed Premises—Increase of Duty—Lease—Sub-lease—Liability of Lessor to pay Proportion of Increase—“Held under a lease”—Licenceholder—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 43, 46—Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2.

Sect. 2 of the Finance Act, 1912, provides that “where the licensed premises are held under a lease” which does not contain any covenant by the lessee to obtain intoxicating liquor from the lessor, the lessee shall be entitled to recover from the lessor a proportion of any increase of the duty payable in respect of the licence under the Finance (1909-10) Act, 1910:—

Held, that this provision does not apply to the case of a lessee of licensed premises who has sub-let the premises and who is not himself the holder of the licence.

APPEAL from Bloomsbury County Court.

The plaintiffs claimed to recover from the defendant, under s. 2 of the Finance Act, 1912, a proportion of the increase of the licence duty charged in respect of a certain public-house under the Finance (1909-10) Act, 1910. (1)

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: “Where the licensed premises are held under a lease or agreement for a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent

or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland. The words ‘lease,’ ‘leased,’ ‘agreement for lease,’ and ‘lessee’ in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee respectively.”

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 46: “Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to

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The facts were as follows: The plaintiffs were the lessees of the public-house under a lease dated May 4, 1904, of which the defendant was the grantor. The lease was for twenty-one years from Midsummer, 1906, at a yearly rental of 150*l.*, and did not contain or import any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor. The premises were sub-let by the plaintiffs to W. E. Saile, who was the licensee and occupier of them, by an agreement dated January 4, 1911, for a period of one year from January 10, 1911, and so on from year to year, at a rent of 156*l.* By the terms of this agreement Saile agreed to purchase from the plaintiffs or their nominees, and from no other person or persons whomsoever, all ale, beer, porter, stout, and other malt liquor whether in bottle or otherwise, and all wines, spirits, and spirituous liquors and liqueurs that should be sold and consumed in, upon, or from the premises. The plaintiffs further agreed with Saile to pay and in fact paid the licence duty payable by him in respect of the premises. Before the Finance (1909-10) Act, 1910, the duty payable in respect of the premises was 30*l.* The duty was now 64*l.*—an increase of 34*l.* The rental value of the premises unlicensed was at the date of the grant of the lease 87*l.*, at the date of the grant of the sub-lease 88*l.*, at the date of the coming into force of the Act of 1912, 89*l.*, and at the date of the beginning of the present proceedings 90*l.* If the estimated rent of the licensed premises unlicensed—that is to say, 87*l.*, 88*l.*, 89*l.*, or 90*l.*—were deducted from the rent of 150*l.* payable in respect of the premises when licensed, the rent attributable to the licence would be 63*l.*, 62*l.*, 61*l.*, or 60*l.*

The county court judge (his Honour Judge Bray) held that the plaintiffs were entitled to recover and gave judgment for 14*l.* 5*s.* 7*d.*,

the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement to be determined by the Commissioners to

be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

which sum bore to 34*l.*, the increase in the duty, the same proportion as 63*l.*, the increase in the rental value of the premises due to their being licensed, bore to 150*l.*, the rent reserved by the lease.

The defendant appealed.

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Lord Tiverton, for the defendant. Under s. 2 of the Finance Act, 1912, a lessee of a free house who has himself sub-let the premises to the licence-holder with a tie is only entitled to recover from his lessor a proportion of the amount which he has himself to pay to the licence-holder under s. 46 of the Finance (1909-10) Act, 1910, and until the amount payable to the latter has been ascertained the action against the lessor cannot be maintained. That appears from the words "so much of any increase of the duty payable in respect of the licence under" the Act of 1910. "Payable" there must mean payable by the licensee. There are three classes of persons who benefit by a house being licensed there are the landlord who gets an increased rent, the brewer who, in the case of a tied house, gets an increased sale of his beer, and the licensee who gets the profits of the trade. The intention of the Legislature as manifested by these two enactments was that all three classes should share the burden of the increased licence duty imposed by the Act of 1910. The duty is payable in the first instance by the licensee; under s. 46 of the Act of 1910 he gets relief against the brewer, if it is a tied house. Then by s. 2 of the Act of 1912 the lessor is made to contribute in the case of a free house. The contention of the plaintiffs, and the judgment of the county court judge, involve the position that a brewer who is a lessee and who sub-lets at a higher rent may be able to obtain from the lessor more than he has had to pay the licensee; in other words it puts the brewer in the position of being able to make a profit out of the enactment. That cannot have been the intention of the Legislature, and the only way out of the difficulty is by reading s. 2 as meaning that persons in the position of the plaintiffs are only entitled to recover from their lessor the specified proportion of the amount which they have had to pay to the licensee under s. 46 of the Act of 1910.

[RIDLEY J. Are the plaintiffs persons who hold licensed

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premises under a lease within the meaning of s. 2 of the Act of 1912? I should have thought that the section only applied to the actual holder of the licence and not to a lessee who has sub-let and is not in occupation of the premises.]

There is authority for saying that the word "held" applies to premises held under a lease although the lessee is not in occupation; but, although the plaintiffs do hold these premises under a lease in one sense, it does not follow that this case is one in which "licensed premises are held under a lease" within the meaning of s. 2, and if so the plaintiffs are not entitled to recover anything from the defendant.

Wootten, for the plaintiffs. The plaintiffs hold these licensed premises under a lease within the meaning of s. 2 of the Act of 1912. Premises may be "held" although they are not occupied. "There is a material difference between a holding and an occupation. A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another: he does not necessarily occupy": *Rex v. Inhabitants of Ditchet*, per Littledale J. (1) Sect. 46 of the Act of 1910 in terms refers to the licence-holder and "his" licence, but in s. 2 the licence-holder is not expressly mentioned, and instead of "his" licence it is "the" licence. The inference to be drawn from this change in the language is that a lessee of licensed premises is within s. 2 although he is not the licence-holder and does not occupy the premises. If s. 2 does not apply to a lessee who has sub-let, then, in the case of a sub-letting at the same rent as that of the head lease, the intermediate lessee, who gets no benefit from the licence, would have to bear the burden of the increased duty while the original grantor, who does get a benefit, would go scot free; whereas on the natural construction of the words the burden would be borne according to the benefit, which must have been the intention of the Legislature. There is, therefore, no necessity for giving to the opening words of s. 2 any other than their natural meaning, or for reading in after the word "held" the words "by a licence-holder." It is not correct to say that according to the view taken by the county court judge it would be possible for an intermediate lessor to make a profit. If he is also, as in this case, the

brewer, the amount of the payment under s. 46 has in default of agreement to be assessed by the Commissioners, who would take into account all the matters specified in s. 46, including any "other benefit" derived from the tie. It is not likely that the sum arrived at by the Commissioners would be such as to enable the brewer to make a profit out of the amount payable by the lessor to him under s. 2.

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RIDLEY J. The question in this case is a difficult one, and we have arrived at a different conclusion from that of the county court judge. The question arises out of two Acts of Parliament, the Finance (1909-10) Act, 1910, and the Finance Act, 1912. Under the Act of 1910, which is the governing Act, the duties on liquor licences were largely increased, and it was enacted by s. 46 that where the licence-holder was bound by any covenant or agreement to obtain intoxicating liquor from any person, the licence-holder should be entitled to recover as a debt due from that person so much of the increase of the duty as was proportionate to any increased rent of the premises or increased prices of intoxicating liquor. That is a provision which was intended to relieve the licence-holder to a certain extent from the payment of the new increased duty by making the person who has bound the licence-holder to obtain liquor from him, and who will receive a benefit in the future from the trade carried on in the house, pay such a portion of the increase as represents the difference in the value of the house between what it is and what it would be if it were a free house. That was, therefore, a provision in favour of the licence-holder as between him and the person to whom he was "tied" for the purpose of obtaining liquor. The position as between landlord and tenant is not dealt with in the Act of 1910. Sect. 46 merely deals with the question as between the licence-holder and any particular person, whether he is the landlord of the premises or not, from whom he is under covenant to obtain intoxicating liquor. Then comes the Finance Act, 1912, which has to be read together with the Act of 1910. Sect. 2 is the section which gives rise to the difficulty in this case. That section, as I read it, is dealing with a different subject-matter from that dealt with in s. 46 of the Act of 1910.

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Ridley J:

Sect. 46 deals with the case of a licence-holder who is "tied" to a particular person, whereas s. 2 of the Act of 1912 is dealing with the case of lessor and lessee, not of tied premises, but of premises which are not tied. The section provides that "where the licensed premises are held under a lease" which does not contain a covenant on the part of the lessee to obtain intoxicating liquor from the grantor of the lease, the lessee shall be entitled to recover as a debt due from the grantor of the lease so much of any increase of the duty payable under the Act of 1910 as may be agreed upon as proportionate to any increased rent payable in respect of the premises being let as licensed premises. That is to say the lessee is to recover something which is proportionate to the whole of the difference which is represented by the existence of the licence, that is, the difference between the value of the house without a licence and its value with one.

That is a totally different thing from what was provided by s. 46 of the Act of 1910. Sect. 46 gives relief to the "tied" licence-holder; s. 2 of the Act of 1912 gives relief in the case of the lessee of a house which is not tied. In 1912 for two years the relief given by s. 46 to tied tenants had been in existence, but s. 2 gives a further relief by enabling the lessee of a free house to recover from the lessor something proportionate to the difference between the value of the house as licensed premises and as unlicensed premises.

The question is how are those two sections to be read together? The county court judge reads them together by including in s. 2 persons in the position of the plaintiffs in this action. They are, he says, persons who hold licensed premises under a lease without a tie, and therefore they are entitled to recover from their lessor such a sum as represents the increase of the duty as between him and them. The result of that is that s. 2 will give the plaintiffs different and possibly greater rights as against the defendant than s. 46 gives to the licence-holder as against them. If, therefore, we are bound to hold that s. 2 applies to persons in the position of the plaintiffs, it gives rise to the serious difficulty that the plaintiffs might possibly be in a position to recover more from their lessor than they have to pay to

their tenant, the licence-holder, and I cannot believe that that was the intention of the Legislature.

I think that this difficulty may be avoided if one considers what is meant by the first words of s. 2, "where the licensed premises are held under a lease." In my opinion s. 2, as well as s. 46, must be read as referring only to a licence-holder. It is the licence-holder who is intended to get the benefit which the section provides, for he is the person who is liable to pay the increased licence duty in respect of which relief is given by s. 46 as against the person who has tied the house and by s. 2 as against the lessor of a house which is not tied. That shews, to my mind, that we ought to endeavour to read the first words of s. 2 as applying only to those persons who were in need of the relief which the section affords, and that we ought not to enlarge the words so as to give relief to persons who do not want it. If the section is read in this way, all the difficulties disappear. It is true that the plaintiffs do in one sense come within the words "where the licensed premises are held under a lease." The plaintiffs hold these premises under a lease in one sense, but they are not the holders of the licence, and they are not the holders of the licensed premises in the ordinary sense of the word. It is true that in the conveyancing sense they are holders of the premises, but as used in s. 2 the words are of somewhat doubtful import, particularly when one remembers that the section is dealing with licensed premises, the actual holder of which, the licensee, is under statutory rights and disabilities. When the section speaks of licensed premises being held under a lease I think it means held by the person who holds the licence. It is true that s. 46 in terms refers to the licence-holder, but s. 2 speaks of the licensed premises being held in such a way as to lead me to the conclusion that the section was intended to apply only to the holder of the licence, and I think that is the real answer to the difficulties of construction which would otherwise arise. It may be that the plaintiffs, who are brewers, have their own grievance, but they are not the persons who have to pay the increased licence duty.

In adopting this construction of s. 2 it does not seem to me

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that we are doing any violence to the language of the section. On the other hand, if we were to hold that the plaintiffs come within s. 2, we should be confronted with the difficulties which the county court judge had to deal with, and from which he only escaped by giving a decision which left it open to the defendant to say that the result was that the plaintiffs might be in a position to make a profit out of an enactment the only intention of which was that the burden which had been imposed on the licence-holder should be shared with him by certain other persons. It is not necessary in my opinion to consider the further difficulties raised by counsel for the plaintiffs. For the purpose of deciding this case it is only necessary to say that we are of opinion that for the reasons which I have given the plaintiffs do not come within the terms of s. 2 of the Act of 1912, and that judgment ought, therefore, to be entered for the defendant.

LORD COLERIDGE J. The question in this case has arisen on the interpretation of s. 46 of the Finance (1909-10) Act, 1910, as supplemented by s. 2 of the Finance Act, 1912. By s. 46 of the Act of 1910 the question of a tied house was dealt with, and in the case of a tied house the licence-holder is to be entitled to recover from the person to whom he is tied so much of any increase in the duty as is proportionate to the extra value payable, whether by rent, that would be in the case of landlord and tenant, or by increased payments to the brewers who have negotiated to supply liquor under tied house terms. Now, that sum would be payable by the brewer, whether he be the landlord or not; but the question then arises as to what is to happen in the case of a free house, and under s. 2 of the Act of 1912 it is enacted that in the case of a free house, "where the licensed premises are held under a lease," the lessee shall be entitled to recover from the grantor of the lease, whether it be a lease or sub-lease, as a debt due from him, so much of the increased duty "as may be proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises." In this case the house was let as a free house, and was sub-let by the lessees, the plaintiffs, as a tied house. That

has created difficulties on either hand. If s. 2 applies to lessees other than licence-holders, then the sub-lessor may in certain circumstances obtain a profit from the Act, for the licence-holder may possibly not recover as much from the sub-lessor as the sub-lessor is entitled to recover from the superior landlord. On the other hand, if s. 2 applies only to the licence-holder, the sub-lessor may be made to bear a burden which he cannot recover from his lessor, who gains the benefit. I think the solution of the difficulty is that the Legislature had in contemplation three parties, first, the licence-holder, secondly, the person supplying liquor under tied agreements, whether he was the lessor of the premises or not, and thirdly the immediate lessor of the licence-holder. I do not think the Legislature had in contemplation any other parties, and inasmuch as the Act is intended entirely to relieve the licence-holder, and no one else, I think that when we come to consider s. 2, reading it into s. 46 of the previous Act, it is quite clear that, although it may have been held in other cases that holding and occupation may be different (as they are), still where an Act of Parliament is dealing with the holder of a licence, and enacting provisions for his benefit, and where the section speaks of licensed premises being held under a lease, that must mean held by the licensee under a lease. In my opinion that is the only reasonable construction to place upon the section, and, if so, then the consequences follow which have been indicated by my Lord.

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Appeal allowed.

Solicitors for plaintiffs: *Godden, Holme & Ward.*

Solicitors for defendant: *Saxton & Morgan.*

F. O. R.

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THE KING *v.* JACKSON.*Ex parte* PICK AND OTHERS.

Local Government—Parish Council—Chairman—Duration of Office—New Council—Annual Meeting—Right of Chairman to vote at Election of his Successor—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3.

By s. 3, sub-s. 1, of the Local Government Act, 1894, it is provided that a parish council shall consist of a chairman and councillors; and by sub-s. 8 that "at the annual meeting the parish council shall elect, from their own body or from other persons qualified to be councillors of the parish, a chairman, who shall . . . continue in office until his successor is appointed."

A parish council elected a chairman from its own body. At the next election of parish councillors the chairman was a candidate but was not elected. At the annual meeting of the new council he presided as chairman. A qualified person, who was not a councillor, was proposed for chairman of the new council. The chairman voted for him, and, the votes being equal, also gave a casting vote in his favour and declared him to be the duly elected chairman of the new council:—

Held, that the chairman of the old council continued in office, and was, therefore, a member of the new council, until his successor was appointed, and that he was entitled to vote and to give a casting vote on the election of the new chairman, and that the election of the new chairman was valid.

RULE NISI directed to George Jackson to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of chairman of the parish council for the parish of Deeping Saint Nicholas, in the Parts of Holland in the county of Lincoln.

On April 15, 1913, the parish councillors of the parish of Deeping Saint Nicholas went out of office. The number of persons to be elected parish councillors of the parish was nine. A poll was held and nine persons were declared to be elected. One Wilkinson, who had been an elected councillor and chairman of the previous council, was a candidate at the election but was not elected. The annual meeting of the new council was held on May 5, 1913. Wilkinson took the chair at the meeting. George Jackson and William Porter, both of whom were qualified to be councillors, although not members of the council, were

nominated for chairman of the council. On a show of hands five councillors voted for Porter and four for Jackson, whereupon Wilkinson gave an original vote for Jackson, thus making the voting equal, and then gave a second or casting vote for Jackson, and then declared Jackson duly elected as chairman by six votes to five, and Jackson then took the chair.

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H. S. Cautley shewed cause against the rule. Jackson was duly elected to the office of chairman at the meeting of the parish council on May 5. The chairman of a parish council, by s. 3, sub-s. 8, of the Local Government Act, 1894 (1), continues in office until his successor is appointed. Therefore until that event happened Wilkinson was chairman, and being chairman was a member of the new council, for by s. 3, sub-s. 1, a parish council consists of elected councillors and a chairman who need not be an elected councillor. The annual meeting is a meeting of the council, not merely of the councillors, and Wilkinson was therefore entitled to vote on the question of the election of his successor, and the votes being equal he as chairman was also entitled to give a casting vote.

In *Rex v. Rowlands* (2), where the question turned on

(1) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 3:

“(1.) The parish council for a rural parish . . . shall consist of a chairman and councillors, and the number of councillors shall be such as may be fixed from time to time by the council, not being less than five nor more than fifteen.

“(5.) The parish councillors shall be elected by the parochial electors of the parish.

“(7.) The parish council shall in every year, on or within seven days after the ordinary day of coming into office of councillors, hold an annual meeting.

“(8.) At the annual meeting, the parish council shall elect, from their own body or from some other persons qualified to be councillors of the

parish, a chairman, who shall, unless he resigns, or ceases to be qualified, or becomes disqualified, continue in office until his successor is elected.

“(10.) With respect to meetings of parish councils the provisions in the First Schedule to this Act shall have effect.”

First Schedule. Part II. Rules applicable to parish councils.

“(3.) The first business at the annual meeting shall be to elect a chairman . . .

“(9.) Every question at a meeting of a parish council shall be decided by a majority of votes of the members present and voting on that question.

“(10.) In case of an equal division of votes the chairman of the meeting shall have a second or casting vote.”

(2) [1910] 2 K. B. 930.

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the election of a chairman of a district council, which depends on different provisions from those applicable to the chairman of a parish council, Lord Alverstone C.J. said (1): "I quite agree that it is a pity that there is no provision in the case of a district council enabling a chairman, like the chairman of a parish council or the mayor of a municipal borough, to continue in office until his successor takes office."

E. M. Pollock, K.C., and *W. W. Mackenzie*, in support of the rule. Wilkinson had been an elected member of the retiring council, and therefore under s. 3, sub-s. 4, on April 15 he went out of office and he was not re-elected as a councillor. No doubt under s. 1, sub-s. 8, the chairman continues in office until his successor is appointed, but that does not mean that he continues to be a member of the council. He continues to be chairman for the purpose of discharging the ministerial duties of the office, such as recording the names of the members present at the annual meeting, receiving notices of motions, and counting votes. He was entitled to give a casting vote, if the votes were equal, but not an original vote. Although sub-s. 1 of s. 3 says that the parish council "shall consist of a chairman and councillors," it does not follow that the chairman of the old council is a member of the new council, for there is no provision in the Act of 1894 similar to s. 58 of the Municipal Corporations Act, 1882, which provides that the mayor and aldermen shall, during their respective offices, continue to be members of the council, notwithstanding anything in that Act as to councillors going out of office at the end of three years. Unless s. 3 of the Act of 1894 is construed in the manner suggested, the absurd result will follow in this case that a minority of the elected members of the new council will have had the power of electing a chairman and thus converting the minority into a majority. The observations of Lord Alverstone C.J. in *Rex v. Rowlands* (1) were merely obiter.

RIDLEY J. In this case a rule nisi for a quo warranto has been obtained calling upon a Mr. Jackson to shew by what right he exercises the office of chairman of a parish council. The question which we have to decide turns on the extent to which

(1) [1910] 2 K. B. 930, at p. 935.

the chairman of a parish council continues to hold office after the expiration of the term for which the council was elected and after a new council has been elected. The chairman of the previous parish council in this case was a Mr. Wilkinson, who had been also an elected member of the council. Wilkinson was one of the candidates at the election of the new council, but he was not elected. He continued, however, to be chairman until his successor should have been elected. The new council held its first meeting, Wilkinson being in the chair, and the first business was to elect a new chairman. There were two candidates for the post, Porter and Jackson. The council consisted of nine elected councillors, five of whom voted for Porter and four for Jackson. Wilkinson then voted for Jackson, and the votes thus being equal he gave his casting vote for Jackson, who was then declared to be the new chairman. The question is whether his election was valid inasmuch as it was only secured by the vote and the casting vote of the former chairman.

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By s. 3, sub-s. 1, of the Local Government Act, 1894, a parish council shall consist of a chairman and councillors. The chairman may, but need not, be a councillor. In the present case the chairman of the previous council had in fact been elected from the councillors, so that the council consisted of nine councillors one of whom was chairman. The new council consisted of nine elected councillors, and neither of the candidates for the office of chairman were elected councillors, so that the council would eventually consist of nine councillors and a chairman elected from outside. The question arises as to what is the position of the chairman of the old council after the new council has been elected and he has failed to be one of the elected councillors. In the case of the chairman of an urban district council it was held in *Rex v. Rowlands* (1) that he goes out of office with the council, but that is not so in the case of the chairman of a parish council, for sub-s. 8 of s. 3 of the Act of 1894 provides in terms that he shall continue in office until his successor is appointed. Mr. Pollock has ingeniously contended that, although he continues in office, he does so only for the purpose of exercising certain necessary ministerial functions such as the summoning

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of the first meeting of the new council, and that he is not entitled to vote at that meeting, unless of course he was an elected councillor in the new council. In my opinion it is impossible to hold that his continuance in office was for the purpose of exercising some only and not all of the duties of a chairman and a member of the council, unless there are to be found in the Act some words clearly defining those of his functions which he is not to exercise. There are no such words ; on the contrary the rules in Part II. of the First Schedule to the Act lay down the duties of the chairman without any qualification as to their exercise during the interval between the demise of the old council and the election of a chairman by the new council. Rule 9 provides that every question at a parish council meeting shall be decided by a majority of votes of the members present. Now, it is quite clear that the chairman of the council is a member of it, for, as I have already pointed out, s. 3, sub-s. 1, provides that the council shall consist of a chairman (who may be elected from outside) and councillors. Therefore at the first meeting of the new council the chairman of the old council is entitled to be present, although he is not a councillor, but because being chairman he is a member of the council, and as a member he is entitled to vote. Then by r. 10 in the case of an equal division of votes the chairman is to have a second or casting vote. I think that when the scope and language of the Act are considered it will be found that there is no difficulty in arriving at the conclusion that the chairman of the old council is entitled to be present and to preside at the first meeting of the new council and to vote on the question of the election of his successor, and, if necessary, give a casting vote. It is not for us to consider whether the result in this particular case will be that the wishes and intentions of the majority of voters in the parish as to the selection of chairman will be defeated. We have only to construe the Act, giving the natural and grammatical meaning to the language used. Although the actual decision in *Rex v. Rowlands* (1) is not in point in this case, for the question there turned on the election of a chairman of an urban district council, the statutory provisions as to which are not the same as those relating to parish councils, yet the

(1) [1910] 2 K. B. 930.

Lord Chief Justice did make some observations in that case which are very relevant to the question we have to decide here. He said (1): "I quite agree that it is a pity that there is no provision in the case of a district council enabling a chairman, like the chairman of a parish council or the mayor of a municipal borough, to continue in his office until his successor takes office." For these reasons I am of opinion that Jackson's election as chairman was valid and that this rule must be discharged.

PICKFORD J. I agree. The question is whether at the first meeting of a newly elected parish council the chairman of the old council is entitled, not only to preside, but also to vote. Under the Act of 1894 a parish council consists of a chairman and councillors. The chairman need not be one of the elected councillors; he may be chosen from outside, but when elected he is a member of the council possessing all the rights of a member of the council, and is entitled to vote on all questions before the council. Sub-s. 8 of s. 3 of the Act of 1894 says that at the annual meeting the parish council shall elect a chairman who shall continue in office until his successor is elected. I think that means that he continues in office for all purposes even though the council of which he was an elected member has ceased to exist, and a new one has been elected, and that he continues in office in the new council with the same rights of voting and having a casting vote as he had in the lifetime of the old council.

It is said that the result of our decision will be to make parties equal on this council and thus produce a deadlock, but we have only to construe the provisions of the Act and are not concerned with the result. It is to be observed, however, that a similar result followed in *Rex v. Rowlands* (2) from holding that the chairman of the old district council was not entitled to act as chairman of the new council.

ATKIN J. I agree.

Rule discharged.

Solicitors: *Oldman, Cornwall & Wood Roberts, for M. Merry, Spalding; Hobson & MacMahon, for Calthrop & Leopold Harvey, Spalding.*

(1) [1910] 2 K. B. at p. 935.

(2) [1910] 2 K. B. 930.

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June 25, 26,
27;
July 5.

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SUPPLY COMPANY v. LONDON HYDRAULIC POWER
COMPANY.

Nuisance—Various Companies laying Mains under Streets—Damage to Electric Cables by Bursting of Hydraulic Mains—Statute—Construction of—Two Acts to be construed together as one Act.

The plaintiffs were the owners of electric cables which had been laid under certain public streets. The defendants were the owners of hydraulic mains which had been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging the plaintiffs' cables. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which so burst had been laid under a private Act which did not contain the usual clause providing that nothing in the Act should exempt the company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read and construed together as one Act":—

Held, (1.) that the doctrine of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, applies not only to cases in which the dangerous thing has escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursting of their mains notwithstanding that they had not been guilty of any negligence.

Midwood v. Manchester Corporation [1905] 2 K. B. 597, followed.

(2.) That the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

TRIAL of action before Scrutton J.

The plaintiffs were a company supplying electricity in the city of London under a provisional order under the authority of which they had placed their cables under certain of the public streets. The defendants were the owners of hydraulic mains containing water at a high pressure used to supply hydraulic power, which mains had been laid under the same streets also under statutory authority. The action was brought to recover damages for injury

to the plaintiffs' cables in four different streets, Water Lane, Upper Thames Street, Cannon Street, and St. Swithin's Lane, caused by the bursting of the defendants' mains. Two of the mains which so burst, those in Upper Thames Street and Cannon Street, were laid under a private Act passed in 1871—34 & 35 Vict. c. cxxi.—which did not contain the usual clause, now found in Gasworks Acts and other similar Acts, providing that nothing in the Act should exempt the company from liability for a nuisance. The other two mains were laid under the London Hydraulic Power Act, 1884 (47 & 48 Vict. c. lxxii.), which in s. 17 provided that "Nothing in this Act shall exempt the company from any indictment suit action or other proceeding at law or in equity in respect of any nuisance caused by them." And by s. 1 of that Act, "This Act may be cited for all purposes as the London Hydraulic Power Act, 1884, and this Act and the Act of 1871 as amended and extended by this Act shall be read and construed together as one Act." The plaintiffs alleged that the water had escaped from the mains by reason of the defendants' negligence, or alternatively that the defendants were liable as for a nuisance. The defendants denied the negligence, and contended that in the absence of negligence they were not liable, especially as they contended that the fractures of their mains were caused by subsidence due to the laying of the plaintiffs' cables. The judge found the following facts:—

A. On February 4, 1912, the defendants' main in Water Lane burst and did damage to the plaintiffs' cable, thereby necessitating repairs which cost 583*l.* 10*s.* 10*d.* The defendants' main was laid in 1895, the plaintiffs' cable in 1901–2. The soil in Water Lane was not very sound, and when the plaintiffs laid their cable in 1902, and the excavations were filled up, the settling down of the soil did damage to the defendants' mains for which the plaintiffs paid. This was put right in a manner satisfactory to all parties at the time, and nothing happened from June, 1902, till February, 1912, when the defendants' main was fractured in a way which was due to subsidence or shifting of the soil, leaving the main unsupported in places, when the weight and pressure of the pipes and the water within, probably assisted by the vibration of the heavy traffic and a sharp frost at the time, caused

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1913 the fracture. The effective cause was the subsidence. This was due to the nature of the soil and the traffic over it. The judge was not satisfied that the plaintiffs' work in 1902 or anything that had happened to it since had anything to do with the subsidence in 1912. The defendants suggested in this and the other cases that the subsidence was caused by the perishing of the wood surrounding the plaintiffs' cable. It was laid in bitumen in a wooden mould, the perishing of which it was said let the soil down. The judge was not satisfied that this was so.

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B. On February 5, 1912, during the same sharp frost, the defendants' main burst in Upper Thames Street and did damage amounting to 41*l.* 0*s.* 10*d.* to the plaintiffs' cables. The defendants' main was laid in 1883, the plaintiffs' cables in 1901. There was a large inspection chamber of the plaintiffs built near the point where the burst occurred. Nothing happened from 1901 to 1912, when the defendants' flange broke transversely near the inspection chamber. The fracture was due to subsidence of the soil leaving the pipe unsupported, and to vibration by heavy traffic in a hard frost. The judge was not satisfied that the plaintiffs' works in 1901, or anything that had happened to them since, had anything to do with the burst in 1912.

C. On February 10, 1912, a burst in the defendants' main in Cannon Street caused damage to the plaintiffs' cables amounting to 3*l.* 8*s.* 7*d.* This amount was so small that very little was said about it. The burst was due to subsidence of soil and vibration caused by the underground railway and traffic above, and the cables of the plaintiffs had nothing to do with it.

D. On August 27, 1912, a burst of the defendants' main in St. Swithin's Lane caused damage to the plaintiffs' cables amounting to 89*l.* 3*s.* 10*d.* The defendants' main was laid in 1892, the plaintiffs' cables in 1901. The fracture was due to subsidence of the soil leaving the main unsupported and subject to the vibrations of heavy traffic. The judge was not satisfied that any work of the plaintiffs' in 1901 or any changes in its condition since had anything to do with the burst in 1912. He found that the defendants were not guilty of any negligence either in the manner of laying their mains or in respect of the materials of which the mains were constructed, and that they

could not by any reasonable care have detected the subsidences before the bursts occurred.

McCall, K.C., and *C. B. Marriott*, for the plaintiffs. Even apart from any question of negligence the defendants are liable for the damage done by the escaping water as for a nuisance, by reason of the provisions of s. 17 of the London Hydraulic Power Act, 1884. The matter is concluded by *Midwood v. Manchester Corporation* (1), so far at all events as concerns any mains laid under the powers of that Act. And the effect of s. 17 applies as well to the bursts in Upper Thames Street and Cannon Street as to those in Water Lane and St. Swithin's Lane, for the Act of 1884 provides that it shall be read and construed together with the Act of 1871, under which the mains in the two former streets were laid, as one Act. The effect of so reading them together is to take away any exemption from liability for nuisance which the defendants enjoyed under the Act of 1871. As then the defendants are not protected by the fact of their mains having been laid under statutory powers, the doctrine of *Rylands v. Fletcher* (2) applies, and the defendants were bound to keep their water in their pipes at their peril.

Sankey, K.C., and *F. Gover*, for the defendants. The doctrine of *Rylands v. Fletcher* (2) has no application to the present case. It only applies as between adjoining owners of land. To render the defendant liable he must have brought the dangerous thing on to his own land, and it must have escaped on to the plaintiff's land. But neither of those conditions are present here. Neither of the parties had any right of property in the soil of the road in which their respective cables and mains were placed. Their position was that of licensees; they were co-users of the soil underneath the surface to the same extent as the general public were co-users of the surface, and no more. But if members of the public in the exercise of their right of traffic were to carry upon the surface some dangerous substance, such as explosives, in quantities permissible by law, they would not in the event of an explosion be liable for any damage done thereby in the absence of negligence, upon the ground that persons using a

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(1) [1905] 2 K. B. 597.

(2) L. R. 3 H. L. 330.

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highway or having their property adjacent to it take upon themselves the risks ordinarily incident to the traffic. Similarly the plaintiffs, when in the exercise of their parliamentary licence they placed their cables where they did, took upon themselves the risks incident to the proximity of the defendants' mains. No doubt the old doctrine, that one who came to a nuisance which was already in existence before he came there could not be heard to complain of it, has long since been exploded. But the ground on which that doctrine was held bad was that the uses to which property may lawfully be put cannot be restricted by the mere fact that the nuisance was there first; a reason which does not apply here, for the plaintiffs had no right of property in the soil of the street at all. The plaintiffs being nothing more than licensees took their licence tale quale with its concomitant perils. The position of the parties in the present case is analogous to that of two guests in an inn owning two horses standing in adjoining stalls in the inn stable. If one such horse put his head over the partition and bit the other, that fact without more would not be enough to render its owner liable; whereas if the two horses had been in adjoining fields belonging to their respective owners, and the offending horse had put his head over the hedge, thereby trespassing on the plaintiff's close, and had so bit the plaintiff's horse, the owner would have been liable whether he knew it to be of a savage disposition or not: *Ellis v. Loftus Iron Co.* (1) The case of *Midwood v. Manchester Corporation* (2) is not in point, except upon the construction of s. 17 of the Act of 1884, for the damage there was done upon the plaintiffs' own premises. Assuming, however, that in the absence of statutory protection from liability for nuisance the doctrine of *Rylands v. Fletcher* (3) does apply to the present case, the defendants have such statutory protection in the case of the bursts in Upper Thames Street and Cannon Street. For the Act of 1871 under which the mains in those streets were laid contained no clause corresponding to s. 17 of the Act of 1884, and consequently authorized the nuisance. The provision in the Act of 1884 that the two Acts should be read together as one

(1) (1874) L. R. 10 C. P. 10.

(2) [1905] 2 K. B. 597.

(3) L. R. 3 H. L. 330.

Act was only intended to apply the provisions of the earlier Act to mains laid under the later Act, not vice versa to apply the provisions of the later Act to mains laid under the earlier, and thereby to take away from the defendants the privilege conferred by the earlier Act upon the faith of which they had expended their money in laying the mains in the two above mentioned streets.

McCall, K.C., in reply.

Cur. adv. vult.

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July 5. SCRUTTON J, after stating his findings of fact as above set out, proceeded as follows: On these findings the defendants contended that they were under no liability. In the words of Lord Russell in *Price v. South Metropolitan Gas Co.* (1), where a passer-by sued for damages by explosion of gas leaking from a fracture in a gas pipe caused by subsidence and heavy traffic, "Sir Edward Clarke was quite right in his contention that before the plaintiff could succeed he must establish actual negligence. It is clear, too, that where a gas company such as this, having statutory authority to lay pipes, does so in exercise of its statutory powers, the 'wild beast' theory referred to in *Fletcher v. Rylands* (2) is inapplicable." (See also *Green v. Chelsea Water-works* (3).) The defendants said that all four works were executed within the statutory zone authorized by their Act of 1871. To this the plaintiffs replied that while this was so two of them, those in Water Lane and St. Swithin's Lane, were executed after the defendants' second Act of 1884. The difference between the two Acts was that the Act of 1871 did not contain the section which is now usual, "Nothing in this Act shall exempt the company from any indictment suit action or other proceeding at law or in equity in respect of any nuisance caused by them." The Act of 1884 did contain this section—s. 17—and also contained a clause—s. 1—"this Act and the Act of 1871 as amended and extended by this Act shall be read and construed together as one Act." The plaintiffs contended that the effect of these clauses was that s. 17 of the Act of 1884 applied to all works

(1) (1895) 65 L. J. (Q.B.) 126.

(2) L. R. 3 H. L. 330.

(3) (1894) 70 T. T. 547, in C. A.

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executed under either Act. I hold that this contention is correct. In *Read v. Joannon* (1) a similar point arose as to the applicability of s. 17 of the Bills of Sale Act, 1882, which Act by s. 3 is to be construed as one with the Act of 1878, to the provisions of the Act of 1878 (if any) affecting debentures. Lord Coleridge C.J. and Wills J. held that s. 17 of the Act of 1882 took debentures out of any provision of the Act of 1878 which applied to them. The result is that the defendants have not an absolute statutory authority to lay their mains as had the Chelsea Water Company or the South Metropolitan Gas Company, but a power qualified by the provision that the grant of the power was not to affect their legal liability for nuisance. As bearing on this state of things the plaintiffs relied on the decision of the Court of Appeal in *Midwood v. Manchester Corporation*. (2) In that case the corporation under a statutory power, with a similar statutory proviso, laid electrical mains in the high road. Leakage from them caused an explosion which wrecked the premises of an owner adjoining the high road. Apart from any finding of negligence the corporation were held liable as for a nuisance. The defendants sought to distinguish this case by pointing out that the plaintiff in *Midwood's Case* (2) was an owner of land to whom the exact words of *Rylands v. Fletcher* (3) as to rights of owners might apply, but that here the plaintiff was not an owner of property, but a licensee who must take the road as he found it, namely, with their pipes, with all their risks, already there. This distinction was, however, absent in the case of *London Hydraulic Power Co. v. St. James Electric Light Co.* (4), tried before Farwell J. in March, 1906, of which I was furnished with a shorthand note. There the hydraulic company claimed against the electric company damages for a burst of the hydraulic mains alleged to be caused by the defendants' cables. The electric company counterclaimed for damages to their cables caused by the hydraulic burst, and relied on *Midwood's Case*. (2) Farwell J. treated that case as deciding that the doctrine of *Rylands v. Fletcher* (3) applied, and that the plaintiffs, unless they could bring themselves within the

(1) (1890) 25 Q. B. D. 300.

(3) L. R. 3 H. L. 330.

(2) [1905] 2 K. B. 597.

(4) Unreported.

exceptions to that doctrine, brought their high pressure water to the road for their own profit, and must keep it there at their own risk, and were therefore liable for damage done by the burst. Without the guidance of these two cases I must have given the matter more careful consideration, as it is not clear at first sight that an isolated damage not immediately caused by the act of the defendant is a "nuisance," or that *Rylands v. Fletcher* (1) applies between co-users of a road. I think, however, the two cases cited bind me to decide that the defendants, who have brought for their own profit a dangerous thing, water at a very high pressure, which if it escapes does enormous damage, into a road used by others, are liable if it escapes without their negligence, unless they can bring themselves within one of the exceptions to the doctrine of absolute liability which have been established. Of those exceptions statutory authority, which would under the *Chelsea Case* (2) be a defence, is excluded by the terms of s. 17 of the Act of 1884. The gradual subsidence of the soil by wear and tear of heavy traffic is not an "act of God," which would be an exception within the doctrine of *Nichols v. Marsland*. (3) I have found that the subsidence did not result from the act or default of the plaintiffs, nor did it result from the malicious act of a third party which the defendants were not under a duty to guard against, which would be a defence under *Rickards v. Lothian* (4) and *Box v. Jubb*. (5) But for *Midwood's Case* (6) I should have some doubt whether the defendants were not protected as persons using the road in the ordinary way, and therefore not liable to persons damaged by the user unless their negligence was proved, on the lines of such cases as *Blake v. Woolf* (7) and the authorities cited therein; for I think it is now an ordinary use of a road to carry mains of water, ordinary or hydraulic, gas, and electricity underneath it, and that there is something to be said for the view that all these co-licensees take the road subject to the risks arising from the ordinary use of the mains of their co-users so

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(1) L. R. 3 H. L. 330.

(4) [1913] A. C. 263.

(2) 70 L. T. 547.

(5) (1879) 4 Ex. D. 76.

(3) (1876) 2 Ex. D. 1.

(6) [1905] 2 K. B. 597.

(7) [1898] 2 Q. B. 426.

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long as the latter are not negligent. But this defence was open in *Midwood's Case* (1), and before Farwell J., and was not sanctioned, and s. 17 of the Act, and similar clauses, may be meant to exclude it.

In the result therefore the defendants have brought a dangerous thing into the road, and the dangerous thing has escaped through the subsidence of the soil. This is just how the water escaped in *Rylands v. Fletcher* (2), where the defendant was held liable, and in my view I am bound to hold that in this case also the defendants are liable for the amount claimed with costs. The same measure of justice will apply to the plaintiffs if their electricity escapes and does damage.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Fladgate & Co.*

Solicitor for defendants : *Beale & Co.*

(1) [1905] 2 K. B. 597.

(2) L. R. 3 H. L. 330.

J. F. C.

[RAILWAY AND CANAL COMMISSION.]

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POSTMASTER-GENERAL *v.* HENDON URBAN DISTRICT COUNCIL.July 7, 17.

Telegraph—Placing Posts and Wires in or across Street or Public Road—Consent of Body “having the control of such street or public road”—Highway not repairable by Inhabitants at large—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 12.

By s. 12 of the Telegraph Act, 1863, “the company” (now the Postmaster-General) “shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road.”

The Postmaster-General, being desirous of placing telegraph posts and wires in, along, and across a street or public road in an urban district, being a public highway not repairable by the inhabitants at large, required the urban district council to give their consent thereto under s. 12 of the Telegraph Act, 1863. It was admitted that the highway was a “street” which the urban district council could require the frontagers to make good under s. 150 of the Public Health Act, 1875:—

Held, upon the authority of *Redhill Gas Co. v. Reigate Rural District Council* [1911] 2 K. B. 565, that the urban district council, not being liable to repair the road, were not the body “having the control of” it within the meaning of s. 12.

APPLICATION by the Postmaster-General to the Railway and Canal Commission.

On July 15, 1912, the applicant, the Postmaster-General, served notice on the defendants, the Hendon Urban District Council, under s. 12 of the Telegraph Act, 1863 (1), requiring

(1) The Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 3: “In this Act the term ‘street’ means a public way situate within a city, town, or village, or between lands continuously built upon on either side, and repaired at the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*, including the footpaths of such way, and any bridge forming part thereof; the term ‘public road’ means a public highway for carriages being repaired at

the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*, and not being a street, including the footpaths of such public highway, and any bridge forming part thereof, and also any land by the side and forming part of such a public highway, but not including a railway or canal.”

Sect. 12: “The company shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public

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them, as the body having the control of the streets or public roads hereinafter mentioned, to give their consent to the placing of telegraphic lines (consisting of posts and the wires and apparatus connected therewith) in, upon, over, along, or across Vivian Avenue, Sylvan Avenue, and Hamilton Road, in the Hendon urban district. The defendants failed within twenty-one days after the receipt of the notice to give such consent, and thereupon a difference arose between the applicant and the defendants within s. 3 of the Telegraph Act, 1878 (41 & 42 Vict. c. 76), which was referred under s. 4 of that Act to the county court judge.

The roads in question were not repairable by the inhabitants at large, and it was contended by the defendants before the county court judge (1.) that the roads were not public highways, and were therefore not "streets or public roads" within s. 12 of the Telegraph Act, 1863; and (2.) that, even if the roads were public highways, as the defendants were not liable to repair

road, except with the consent of the body having the control of such street or public road"

Sect. 13: "Where any landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company shall not place any work under, in, upon, over, along, or across such street or public road, except with the consent of such landowner or other person, in addition to the consent of the body having the control of such street or public road, where under this Act such last-mentioned consent is required"

By s. 2 of the Telegraph Act, 1868 (31 & 32 Vict. c. 110) (which empowered the Postmaster-General to acquire the undertakings of the telegraph companies), the term "the company" in the Telegraph Act, 1863, includes the Postmaster-General.

The Telegraph Act, 1892 (55 & 56 Vict. c. 59), s. 3: "The provisions of the Telegraph Acts, 1863 and 1878, relating to streets, public roads, lands, and buildings within the limits of any city or municipal borough, or town corporate, or any town having a population of thirty thousand inhabitants or upwards, shall, as amended by this Act, extend to streets, public roads, lands and buildings within the limits of any urban sanitary district; and for the purposes of those Acts the terms public road and street shall respectively include a public highway for carriages and a public way, although not repairable in manner in the Telegraph Act, 1863, mentioned, and the term 'public road' shall include a public highway for horses and a private road which is also a public footpath, if such highway or road is enclosed between hedges, walls, or other fences."

them, they were not the body "having the control of" them within the meaning of the section. The county court judge upheld both these contentions, and made his award in favour of the defendants, declining to give his consent.

The Postmaster-General being dissatisfied with the award of the county court judge made this application to the Railway and Canal Commission under s. 4 of the Telegraph Act, 1873, to hear and determine the difference and to give their consent to the placing of the telegraphic lines in the said roads.

At the hearing before the Railway and Canal Commission it was admitted on behalf of the defendants that the roads in question were public highways, and were therefore "streets or public roads" within s. 12 of the Telegraph Act, 1863, that they were "streets" to which the defendants could apply the provisions of s. 150 of the Public Health Act, 1875, and that as regards Hamilton Road a notice had been served under that section requiring the frontagers to make good the road; and the only point raised was whether the defendants were the body "having the control" of the roads within the meaning of s. 12 of the Telegraph Act, 1863, so as to be able to give consent to the placing of the telegraphic lines in the said roads.

Sir John Simon, S.-G., and G. A. H. Branson, for the applicant. It is now admitted that these roads are public highways. The only question therefore is whether the defendants have the control of them within the meaning of s. 12 of the Telegraph Act, 1863, so as to be able to give their consent to the applicant placing telegraph posts and wires in, along, or across such roads. It is said that, because the highways are not repairable by the inhabitants at large, the defendants, who are the highway authority for the district, are not the body empowered by that section to give consent. By s. 144 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), the urban sanitary authority were constituted the surveyor of highways within their district, with all the powers, duties, and liabilities of such surveyor; and by s. 21 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), urban sanitary authorities were called urban district councils. The defendants therefore now exercise within their district the

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office of the old surveyor of highways. Every public road within an urban district is under the control of the urban district council, whether it is repairable by the urban district council or not. It is clear from s. 13 of the Telegraph Act, 1863, that the body having the control of the road need not be the body liable to repair it, because it provides that where a landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public) the consent of such landowner or other person is required "in addition to the consent of the body having the control of such street or public road." Liability to repair therefore cannot be the test of control. The streets or roads in question are public highways, and it is the defendants' duty to protect the rights of the public over those streets or roads. The owner of the soil has no interest in them qua public roads. The body which has to protect the public right of way over the road is the body having "control" of it within the meaning of this Act. Sect. 150 of the Public Health Act, 1875, affords an illustration of the control exercised by the defendants over this class of "streets." An urban district council can, under that section, serve notice on the frontagers to repair the streets, and if they neglect to do so the defendants can do the work and charge the frontagers with the expense; or, if the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), has been adopted in their district, they may repair and make good the streets under the provisions of that Act. The definition of "road authority" in s. 9 of the Telegraph Act, 1892, upon which reliance will be placed by the defendants, is not against the view submitted on behalf of the applicant. That section says that "In this Act, unless the context otherwise requires, the expression 'road authority' means the body having the control of a street or public road, and where a street or public road is not repairable at the public expense, means the body which would have control of such street or road if it were repairable at the public expense." In the first place that definition only applies to that particular Act, and therefore does not apply to the Telegraph Act, 1863; and, secondly, the expression "road authority" is never used in the Act of 1863, and only once in the Act of 1892, namely, in s. 4, sub-s. 1.

In *Redhill Gas Co. v. Reigate Rural District Council* (1) it was decided that the rural district council were not the persons having the "control or management" of a highway, which had been dedicated to the public but which was not repairable by the inhabitants at large, within the meaning of s. 8 of the Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15). No doubt in that case liability to repair was treated as the test of control. But the words there were "control or management," which are not the same as those in s. 12 of the Telegraph Act, 1863, and the construction of one Act is no guide as to the construction of another Act passed with a different object. Moreover that was the case of a rural district council whose powers are not so wide as those of an urban district council. It is obvious that for the purposes of the Telegraph Act, 1863, the Legislature must have considered that some public body would have the control of the public roads. There may be a public road for the repair of which no one is liable, and yet it must be under the control of some one. The true view is that the urban council has the control of all public roads, whether repairable by the inhabitants at large or not, within their district. The applicant therefore is entitled to succeed. [*Reg. v. Wilson* (2) was also referred to.]

J. A. Foote, K.C., and *Rayner Goddard*, for the defendants. Sect. 13 of the Telegraph Act, 1863, speaks of a landowner or other person being liable "for the repair of any street or public road." "Street" and "public road" are each defined in s. 3 of the Telegraph Act, 1863, as being a public highway repaired at the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*. Therefore s. 13 refers to a landowner liable to repair *ratione tenuræ* or to a body such as turnpike or other public trustees. In such a case, under s. 34 of the Highway Act, 1862 (25 & 26 Vict. c. 61), if the person liable for the repair does not repair the road, the highway board of the district may repair it, and the expense shall be paid by the person liable to repair. The highway authority therefore had the power to do the repairs from time to time as the road became out of repair, if the person liable for the repair made default. The power to do the repairs and the liability to repair were in

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(2) (1852) 18 Q. B. 348.

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different persons. Sect. 13 deals with those classes of roads only, and the three roads in question here do not come within any of those classes. That is the effect of s. 13 read in the light of the state of the law as then existing. That being so, s. 9 of the Telegraph Act, 1892, is a distinct statutory recognition in that Act that the body—which is defined in s. 3 of the Telegraph Act, 1863, to include a person—having the duty to repair is the body having the control of the street or public road, because it enacts that “In this Act, unless the context otherwise requires, the expression ‘road authority’ means the body having the control of a street or public road, and where a street or public road is not repairable at the public expense, means the body which would have control of such street or road if it were repairable at the public expense.” That shews that at any rate *prima facie* the body being liable to repair is the body having control. The Telegraph Acts, 1863 and 1892, are dealing with the same subject-matter, and the same meaning ought to be given to the same words in each Act. Sect. 149 of the Public Health Act, 1875, strengthens this view, because it provides that all streets being highways repairable by the inhabitants at large in any urban district shall vest in and “be under the control of” the urban authority. There would be no object in that enactment if the highways were already under the control of the urban authority. *Redhill Gas Co. v. Reigate Rural District Council* (1) is a direct authority in favour of the defendants. It was there held that the test of “control” of a street was the liability to repair. The Act under discussion in that case dealt with a similar matter to that dealt with in the Telegraph Act, 1863, namely, the laying of gas mains in public streets in the one case and the placing of telegraph posts and wires in public streets in the other case. The word “control” ought to have the same meaning in each Act. With regard to s. 150 of the Public Health Act, 1875, it throws no light on the meaning of the words “having the control” in an Act passed twelve years before. But if s. 150 of the Act of 1875 is looked at, it confers no “control” over the road upon the urban council within the meaning of s. 12 of the Act of 1863. It only confers a power to make the road

(1) [1911] 2 K. B. 565.

serve its purpose as a public highway by being kept in proper condition. It no more gives control over the street than the statutory power which the local authority have under the Public Health Act, 1875, to take proceedings to compel the owner or occupier of premises to abate a nuisance thereon gives them the control of the premises.

Sir John Simon, S.-G., in reply.

Cur. adv. vult.

July 17. BANKES J. read the following judgment:—This is an application by His Majesty's Postmaster-General to this Court under s. 4 of the Telegraph Act, 1878, to decide a difference which has arisen between himself and the Hendon Urban District Council. The difference has arisen in the following way. There are within the area under the jurisdiction of the said district council three roads named respectively Vivian Avenue, Sylvan Avenue, and Hamilton Road. All three roads have been laid out as roads. All three are open for public use, but none of them have been taken over by the district council and none of them are repairable by the inhabitants at large. The Post Office authorities were desirous of placing telegraph posts and wires over, along, or across these roads, and they applied to the district council for their consent to this being done. The district council were not prepared to give any consent; and thereupon the difference which had thus arisen was taken before the county court judge for his decision in pursuance of the provisions of the Telegraph Act, 1878. Before the county court judge the district council raised two contentions—first, that the Postmaster-General had not proved that the roads in question had ever been dedicated to the public; secondly, that in any event the roads were not under the control of the district council.

The county court judge decided both points in favour of the district council, and the Postmaster-General being dissatisfied with this decision has brought the difference before this Court for decision, as he is entitled to do under the Telegraph Act, 1878. Upon the argument before us counsel for the district council abandoned the first of the points above indicated, and admitted that all three roads were "streets or public roads"

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within the meaning of s. 12 of the Telegraph Act, 1863. He also admitted that as regards Hamilton Road a notice had been already served by the district council under s. 150 of the Public Health Act, 1875, requiring the frontagers to make up that road; and he also admitted that both the other roads were streets in regard to which the district council were in a position to serve similar notices at any time.

Under these circumstances the only point which this Court has to decide is whether the roads in question or any of them are under the control of the district council. The section which renders it necessary for the Postmaster-General to obtain the consent of the body having the control of any street or public road before any telegraph poles or wires are placed over, along, or across such street or public road is s. 12 of the Telegraph Act, 1863. Sect. 13 of the same Act provides that where any landowner or other person is liable for the repair of any street or public road the consent of such landowner or other person as well as the consent of the body having the control of such street or public road must be obtained before any telegraph poles or wires can be placed over, along, or across the same. Sect. 9 of the Telegraph Act, 1892, was also referred to in argument, but I do not think that its provisions have any real bearing upon the point which we have to decide.

It was contended before us by counsel for the local authority that the roads in question, not being highways repairable by the inhabitants at large, and not having been taken over by the local authority, are not under their control within the meaning of s. 12 of the Telegraph Act, 1863. It was contended for the Postmaster-General, on the other hand, that the obligation to repair a street or road was not the test to apply in deciding whether such street or road was under the control of a local authority within the meaning of s. 12 of the Telegraph Act, 1863, and that the provisions of s. 13 of the same Act are conclusive to shew that this was so.

It is clear from the definition of street and public road given in s. 3 of the Telegraph Act, 1863, that that Act was dealing only with streets and public roads which were repairable at the public expense or at the expense of any turnpike or other trust or

ratione tenuræ. I think it very probable that if the Acts in force at the time of the passing of the Telegraph Act, 1863, conferring on urban and rural authorities their powers over roads and streets within their districts were looked into, the reason for the insertion of s. 13 in the Telegraph Act, 1863, would appear; but for the reasons hereinafter appearing I do not think that it is necessary for the purpose of deciding the present case to do this. It was not until the year 1892, by the Telegraph Act of that year, that the definition of street and public road was extended so as to include for the purpose of the Telegraph Acts roads of the class with which we are dealing, that is to say, roads which are not repairable by any one.

It is, I think, material to trace the legislation which dealt with the powers of urban local authorities over roads within their districts from 1863 to the present time in order to ascertain what their existing powers are which can be said to constitute control within the meaning of s. 12 of the Telegraph Act, 1863. The Public Health Act, 1875, repealed the Public Health Act, 1848, and the Local Government Act of 1858 and the Acts amending the same, and divided England (except the metropolis) into districts to be called respectively urban and rural sanitary districts. The urban sanitary districts were placed under the control as the urban authority of either the mayor, aldermen and burgesses, the improvement commissioners, or the local board, according as the district was either a borough, an Improvement Act district, or a local government district. So far as roads and streets were concerned, the urban authority was by s. 144 of this Act clothed with all the authority of the surveyors of highways, and by s. 149 all streets being or which at any time should become highways repairable by the inhabitants at large were vested in and put under the control of the urban authority. By s. 150 of the same Act power was conferred upon the urban authority to require frontagers to make up streets which were not repairable by the inhabitants at large, and if they failed to do so to make them up themselves at the expense of the frontagers. By the Local Government Act, 1894, urban district councils were created to take the place of the then existing local boards, and rural district councils were

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created as the authority to control rural districts. These last mentioned councils had transferred to them by s. 25 of this Act all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, including as respects highways the powers conferred upon an urban authority by s. 144 of the Public Health Act, 1875. By the same section power is given to the rural district council to require a person liable to repair a highway *ratione tenuræ* to repair it, and if he fail to do so to do the repairs themselves and charge the cost to him.

The last Act which it is necessary to refer to is the Private Street Works Act, 1892, which confers additional powers upon urban and certain rural district councils of making up roads not repairable by the inhabitants at large and charging the expense to the frontagers.

I have referred to the above statutes at some length because I consider it necessary to do so in approaching what is, to my mind, the only point in this case, namely, whether it is possible to distinguish the present case from the case of *Redhill Gas Co. v. Reigate Rural District Council*. (1) In that case the question turned upon whether the Reigate Rural District Council were the persons having the "control or management" of a certain road within the meaning of s. 8 of the Gasworks Clauses Act, 1847. In my opinion no distinction can be drawn between this case and that one either upon the ground of any difference in the wording of the statute with regard to which the question arose, or from the fact that the present is the case of an urban district council, whereas in the other it was a rural district council which had the right to exercise the powers given by the Private Street Works Act, 1892. In both cases the roads are roads not repairable by the inhabitants at large; both authorities are successors of the old surveyor of highways, and both can exercise the powers conferred by the Local Government Act, 1894.

In the course of the argument I asked counsel for the Postmaster-General to indicate to us what powers over the roads in question the Hendon District Council had which constituted the control contended for, and, in reply, it was stated that the only

(1) [1911] 2 K. B. 565.

powers relied on were those conferred by s. 150 of the Public Health Act, 1875, and the Private Street Works Act, 1892.

After giving the matter careful consideration, I cannot distinguish the present case from that of *Redhill Gas Co. v. Reigate Rural District Council*. (1) The two judges, who constituted the majority of the Court in that case, expressly negatived the argument that the powers inherited by a district council from the surveyor of highways constituted any control over the streets in their district, and each learned judge dealt with a point which is, in my opinion, fatal to the contention of the Postmaster-General in the present case. At p. 575 the Lord Chief Justice expressly holds that where a road is made up under the powers of the Public Health Act, 1875, or the Private Street Works Act, 1892, it does not come under the control of the local authority until the work is completed and the road has been taken over; and at p. 573 Bray J. expressly holds that the effect of s. 149 of the Public Health Act, 1875, is that no streets except those repairable by the inhabitants at large and which vest in the local authority are under their control.

Under these circumstances I consider that this Court is bound by the decision in the *Reigate Rural District Council Case* (1), and that we must accordingly determine this difference adversely to the contention of the Postmaster-General.

SIR JAMES WOODHOUSE. I am of the same opinion. The *Reigate Case* (1) is a binding authority upon us, and I am unable to find any distinction in principle between that case and the present one.

BANKES J. I have the authority of my other colleague, Mr. Gathorne-Hardy, to say that he concurs in my judgment.

Application dismissed.

Solicitor for applicant: *C. Llewelyn Davies.*

Solicitor for defendants: *Ernest Bevir.*

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ROSS, APPELLANT *v.* HELM, RESPONDENT.

Adulteration—Sale of Food—Prosecution by Inspector—Necessity for Inspector to prove his Appointment—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 12, 13, 14, 20.

The appellant, an inspector appointed under the Sale of Food and Drugs Acts, laid an information under s. 6 of the Sale of Food and Drugs Act, 1875, against the respondent for having sold to the prejudice of the purchaser an article of food which was not of the nature, substance, and quality of that demanded. At the hearing of the information the appellant in his evidence stated that his name was "Alexander Ross, an inspector under the Food and Drugs Act," and put in evidence the certificate of the public analyst which was addressed "To Inspector A. Ross." He was not cross-examined or asked to produce his appointment as inspector. When the appellant's case was closed the respondent submitted that it was necessary that the appellant should prove that he was a duly authorized officer, and that, as he had not produced his appointment, the information should be dismissed. The appellant asked for an adjournment to enable him to produce his appointment. The justices were of opinion that it was necessary for the appellant formally to prove his appointment as inspector, and that, having failed to do so, he could not be allowed, after having closed his case, to call further evidence, and they dismissed the information:—

Held, that it was not necessary for the appellant formally to prove that he was an inspector by producing his appointment, and that, as he had given prima facie evidence that he was an inspector, the decision of the justices was wrong.

Semble, per Channell and Avory JJ., that it was not necessary for the appellant to prove that he was an inspector.

CASE stated by justices for the West Riding of the county of York.

An information was preferred on April 27, 1912, by Alexander Ross (the appellant), an inspector appointed by the County Council of the West Riding of Yorkshire, under the Sale of Food and Drugs Acts, 1875 to 1907, against Richard Helm (the respondent), of the Gascoigne Arms, Barwick-in-Elmet, innkeeper, for that he, the respondent, at Barwick-in-Elmet did on April 4, 1912, unlawfully sell by the hands of Mark Helm, his servant or agent, to the prejudice of the appellant, the purchaser, a certain article of food, to wit, whisky, which was

not of the nature, substance, and quality of that demanded by the purchaser.

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Upon the hearing of the information the following facts were admitted or proved:—

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(a) On April 4, 1912, the appellant visited the Gascoigne Arms, a duly licensed public-house, of which the respondent was the licensee. He went into the bar and asked for half a pint of whisky. He was served with it by Mark Helm, the son of the respondent; he paid 1s. 4d. for it, and when the whisky had been handed over he informed Mark Helm that he had bought it for analysis, and that it was his intention to have the same analysed by the public analyst, and he then divided the whisky into three parts, putting each part into a bottle. Each bottle was separately labelled, sealed, and marked. One of the bottles he handed to Mark Helm, one he forwarded to the public analyst, and the third he retained and produced in Court.

(b) The appellant received in due course from the public analyst a certificate relating to the whisky which was directed "To Inspector A. Ross," and which stated (inter alia) that the analyst was of opinion that the sample had an alcoholic strength of 33·37 degrees under proof.

(c) The original certificate signed by the analyst was produced by the appellant and given in evidence.

(d) No notice was posted in the bar or in any part of the respondent's premises, nor was any verbal notice given to the appellant, that the article so sold was diluted with water.

The appellant went into the box and began to give his evidence as to the purchase of whisky. The chairman said, "You have not yet given your name." He replied, "Alexander Ross, an inspector under the Food and Drugs Act," and proceeded with his case. The solicitor on behalf of the respondent did not cross-examine the appellant upon his alleged appointment or ask him to produce his appointment under the seal of the county council.

The appellant, having given his evidence, retired from the witness-box, and the solicitor on behalf of the respondent then submitted that it was necessary to prove as a condition precedent

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ROSS the case of *Harris v. Williams* (1) in support of his contention,
v. and that the appellant had not produced such appointment as
HELM. an inspector, and thereupon asked that the case should be
dismissed.

The appellant asked for the case to be adjourned as he had not his appointment with him, but could soon get it.

The respondent's solicitor objected to this on the ground that the appellant, having closed his case, could not then be heard further or be allowed to put in further evidence.

The justices were of opinion that it was necessary that the appellant should have formally proved his appointment as such inspector as aforesaid, and that having failed to do so he could not be allowed, after having closed his case, to put in further evidence, and accordingly they dismissed the information.

The question for the opinion of the Court was whether, upon the above statement of facts, the justices came to a correct determination in point of law.

H. T. Waddy, for the appellant. The proceedings against the respondent were taken under s. 6 of the Sale of Food and Drugs Act, 1875, and there was no necessity for the inspector, who prosecuted, to produce his appointment as inspector. By s. 12 "any purchaser" of an article of food or of a drug may have the article analysed, and by s. 13 any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable, under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of the Act, may procure a sample of a food or drug for submission to analysis. Sect. 14 provides that the purchaser—that is, the purchaser under either of the two preceding sections—who intends to have the article analysed shall divide the sample into three parts, and by s. 20 the person causing the analysis to be made may take proceedings to recover the penalty. There is no provision in the Act requiring an inspector, who takes proceedings, to produce his appointment. It is immaterial that

(1) (1889) 6 Times L. R. 47.

the appellant should have described himself as or was an inspector. Any purchaser can take proceedings, and the same rights are available to a person who is an inspector as to any other purchaser. *Harris v. Williams* (1), which was cited to the justices, does not touch this point, and it certainly is not a decision that the inspector must produce his appointment. By s. 2 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), it is no defence to allege that the purchaser, having bought only for analysis, is not prejudiced by the sale. If the justices are right, a police constable acting under the provisions of the Act would be obliged to prove his appointment. But even if it were necessary for the appellant to prove that he was a duly qualified inspector, he did prove it. Evidence of his acting as such was sufficient *prima facie* evidence of his appointment: *M'Gahey v. Alston*. (2) The appellant moreover stated in evidence that he was an inspector. The decision of the justices was therefore wrong.

H. I. P. Hallett (*Lowenthal* with him), for the respondent. If an inspector could as such purchase a sample under s. 12 of the Sale of Food and Drugs Act, 1875, and so start proceedings to enforce a penalty, s. 13 would not be wanted. It would be altogether superfluous. Further, an inspector can only act within the district for which he is appointed: *McNair v. Cave*. (3) That was a decision under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, but it has an important bearing on this case. Lord Alverstone C.J. there said (at p. 28) that "under the earlier Act of 1875 both analysts and inspectors were only authorized to act in the district for which they were appointed"; and (at p. 29) that "under the earlier Act it is clear that inspectors could only act locally." That shews the necessity of an inspector producing his appointment. If the contention of the appellant is correct, an inspector might start proceedings under the Act as an inspector, and when the point was taken that he was not appointed inspector for the district in which he was prosecuting he might take up the position that he was prosecuting as a private individual. It was for the prosecution to

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(1) 6 Times L. R. 47.

(2) (1836) 2 M. & W. 206.

(3) [1903] 1 K. B. 24.

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prove their case, and the fact that the appellant was not cross-examined did not amount to an admission that he was a duly appointed inspector. He never gave any evidence that he was an inspector appointed for the district.

LORD ALVERSTONE C.J. I propose to decide this case upon the second point, namely, that there was evidence before the justices that the appellant was an inspector, and that the case ought to have proceeded, and there was no necessity for any adjournment. I am not suggesting that Mr. Waddy is not right upon the first point. My first impression was that he was right, and that it was not necessary for the appellant to prove that he was an inspector, but I am not so satisfied about it. I have not gone with sufficient care through all the sections to say that there is no such necessity. It may be that the case of *McNair v. Cave* (1) is some authority for the contention that there must be evidence to shew that he is an inspector for the district. I do not therefore wish to decide, as the question may arise in some other case, that it is not necessary for an inspector taking proceedings to prove that he is an inspector in the district in which he was acting. The justices, in my opinion, were clearly wrong. The information was laid by Alexander Ross, an inspector appointed by the County Council of the West Riding of Yorkshire. He had submitted the whisky for analysis, and the analyst's certificate was sent to him directed "To Inspector A. Ross." The case states that the appellant went into the witness-box and began to give his evidence. The chairman said, "You have not yet given your name." He replied, "Alexander Ross, an inspector under the Food and Drugs Act." He was not cross-examined, and then when his case was, as it is called, closed, an objection was taken that the appellant had not produced his appointment. In my opinion that objection was bad. The appellant was not cross-examined as to the truth of what he had said. The justices were of opinion that it was necessary that the appellant should have formally proved his appointment as such inspector as aforesaid, and that having failed to do so he could not be allowed, after having closed his case, to put in further evidence, and accordingly

(1) [1903] 1 K. B. 24.

they dismissed the information. That was a wrong decision. There was no necessity for formal proof of his appointment in the manner suggested ; there was necessity, as I assume for the purposes of my judgment, of proof, but not of formal proof. Evidence had been given which established prima facie that the appellant was an inspector. Production of the document, which he might have lost or which he might not have with him, was not necessary to establish the fact. If he had been asked the question, "Do you swear you are an inspector?" and he had answered "Yes," the justices could not have said that formal proof was necessary. They said that because he had closed his case under those circumstances he ought not to be allowed to give further evidence about it, he having offered to get the document appointing him. That was a ruling that there was no evidence that the appellant was an inspector, and that therefore the case should not proceed. In my opinion they were wrong, and they ought to have heard the case. The case must be remitted to them to hear and determine.

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CHANNELL J. I agree. There was ample prima facie evidence that the appellant was an inspector, and therefore, if it was necessary to prove it, there was sufficient proof. I agree that that makes it unnecessary to decide the other point. I can see no necessity for proving that he was an inspector.

AVORY J. I agree with my brother Channell's judgment. I think that there was in this case, where the charge was that of selling to the prejudice of the purchaser under s. 6 of the Act of 1875, no need to prove that the appellant was an inspector, and that the justices had the same jurisdiction to deal with the case whether he was an inspector or not. Upon the other point I also agree that the justices were wrong because they held in effect, after the inspector had closed his case, that he could not be allowed to put in further evidence, and they accordingly dismissed the information. They were clearly wrong in that, because they overlooked the fact that they might have adjourned the case for the purpose of formally proving his appointment, if necessary.

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For the reasons I have given I think it was not necessary to prove it, and further I think that it was sufficiently proved.

Appeal allowed and case remitted to justices.

Solicitors for appellant: *Clements, Williams & Co., for W. Vibart Dixon, Wakefield.*

Solicitors for respondent: *Nicholls, Herbert & Co., for A. W. Willey, Leeds.*

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June 30 ;
July 19.

[COURT OF CRIMINAL APPEAL.]

THE KING v. RODLEY.

Criminal Law—Evidence—Breaking into Dwelling-house with Intent to ravish a Woman—Evidence that shortly afterwards Accused had Carnal Knowledge of another Woman—Evidence as to Accused's State of Mind and Body—Admissibility—"No substantial miscarriage of justice"—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 1.

The appellant was indicted for having in the night time broken and entered a dwelling-house with intent to ravish a woman. The evidence for the prosecution was to the effect that the appellant broke into the house between midnight and 1 A.M., that the prosecutrix, hearing a noise, came downstairs, when the appellant seized her, and pulled up her clothes, and that upon the woman's father coming downstairs he went away. The defence at the trial was that the evidence for the prosecution was not true, that the appellant went to the house for the purpose of courting the prosecutrix with her consent, and that he did not break into the house and did not intend or attempt to ravish her. The prosecution tendered evidence that the appellant at about 2 A.M. on the same morning went to the house of another woman, about three miles from the prosecutrix's house, and gained access to her bedroom down the chimney, and with her consent had connection with her. It was contended that this evidence was admissible to shew the state of the appellant's mind and body at the time when he broke into the prosecutrix's house, and coupled with the evidence of what happened when he was in the house was admissible to shew the intent with which he broke in. The evidence was admitted and the appellant was convicted:—

Held, that the evidence was not relevant to any of the issues in the case, and was not admissible, and that, as the jury might have been influenced by it, the Court could not say that no substantial miscarriage of justice

had occurred so as to allow of the application of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and that therefore the conviction must be quashed.

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APPEAL against conviction.

The following statement of facts is taken from the judgment of the Court:—

“The appellant was tried at the last Carmarthen Assizes before Lord Coleridge J. upon an indictment which charged him with having on April 20 last in the night time burglariously broken and entered the dwelling-house of John Jones with intent to commit a felony, that is to say, with intent to ravish one Annie Gwendoline Jones. It appeared from the evidence given at the trial for the prosecution that Annie Jones was living alone with her father in a cottage, and that on the night in question she heard a noise in the house between 12 and 1 in the morning; that she got up to see what was the matter and found the appellant coming up the stairs with his cap down over his eyes and face and with his boots off; that she shouted at him, upon which he went downstairs; that she followed him and hit him two blows on the head with a stick; that she then recognized him as a man whom she had known for some years, and who had worked in the neighbourhood; that she then spoke to him by name, whereupon he sprang at her, knocked the candle out of her hand and seized her, putting his hand over her mouth and forcing her against some boxes; that he pulled up her clothes and told her that if she did not give in to him he would not mind killing her; that she managed to get away from him and get outside the door, when by the light of the moon she saw that his trousers were down; that at this point her father, who was lame and infirm, came on the scene, and the appellant went away; that upon examination it appeared the appellant had got into the cottage by forcing the back door. The appellant was arrested a few days after the occurrence, when he denied having been at the place at all.

“Before the magistrates the appellant stated that he called no witnesses and that he had nothing to say. Before the magistrates a woman was called as a witness who deposed to the fact that about 2 o'clock on the same morning as that deposed to by

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Annie Gwendoline Jones the appellant had come to her house, where she lived alone, and had gained access to her bedroom by coming down the chimney, and that he had then had connection with her with her consent. Her house was about three miles from that of Annie Jones.

“At the trial before Lord Coleridge J. the appellant was defended by counsel, and the course the proceedings took was as follows: The first witness called was Annie Gwendoline Jones. She was cross-examined with a view of establishing that the appellant came into the cottage by her permission and that nothing of the kind suggested by the witness had taken place, and that the appellant had merely ‘courted’ her, and that whatever had occurred while she and the appellant were in the kitchen was consented to by her. After the father had been called to corroborate his daughter’s story, the woman to whose house the appellant subsequently went was called. The learned judge, evidently anticipating an objection to the evidence, addressed the counsel for the prisoner, and the following is an account from the shorthand note of what occurred:—

“ ‘Mr. Justice Coleridge.—Mr. Langman, in regard to this witness’s evidence, it all depends upon what the defence is. Is your defence that he was not there at all? Mr. Langman.—No. Mr. Justice Coleridge.—Is it your defence that he was drunk? Mr. Langman.—No. Mr. Justice Coleridge.—Is it your defence that she consented? Mr. Langman.—Yes; he was invited there, that he went there merely to court the girl. Mr. Justice Coleridge.—That she consented? Mr. Langman.—He never went there to commit the offence. Mr. Justice Coleridge.—Then I shall take this evidence. Mr. Langman.—That there was consent to this extent, that she allowed him to court her. Mr. Justice Coleridge.—The charge is that he attempted to rape her. It would be a defence if she consented. If your defence is that she consented I think it is very open to question whether it would be relevant for reasons which I need not give now. Mr. Langman.—In view of the prisoner’s statement I am unable to put that defence forward. Mr. Justice Coleridge.—Consent? Mr. Langman.—Yes, because he never went there with the intention to commit any offence.’

"The evidence of the woman was then proceeded with."

She gave evidence to the effect above stated, and the jury convicted the appellant.

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T. W. Langman, for the appellant. The immediate intent with which the entry is effected is the material one: *Reg. v. Tucker* (1); and the evidence that later on the same night the appellant went into another house and had carnal knowledge of a woman there is not admissible to prove the intent. No connection was proved between the alleged breaking into the house charged in the indictment and the subsequent act of immorality, which was not a criminal offence. The Court cannot say that the jury may not have been influenced in convicting the appellant by this evidence, and therefore cannot say that no substantial miscarriage of justice has actually occurred within the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23). [*Makin v. Attorney-General for New South Wales* (2) was also referred to.]

Marlay Samson, for the prosecution. The evidence was admissible. The fact that on the same night a short time after he broke into the prosecutrix's house and at a place reasonably near the appellant had carnal knowledge of a woman is evidence to shew the state of his mind and body when he broke into the house. The bodily condition of the appellant when he broke in was material. Coupled with the evidence as to what he did after he had broken into the house it is admissible to show the intent with which he broke in, namely, to commit a rape. [*Reg. v. Rhodes* (3) was referred to.]

Cur. adv. vult.

July 19. The judgment of the COURT (A. T. Lawrence, Bankes, and Atkin JJ.) was read by

BANKES J. After stating the facts as given above, the learned judge proceeded: The appellant's counsel now contends that the woman's evidence ought not to have been admitted, and that the conviction cannot stand. Of recent years the question as to the

(1) (1844) 1 Cox, C. C. 73.

(2) [1894] A. C. 57.

(3) [1899] 1 Q. B. 77.

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admissibility upon a criminal trial of evidence of the commission by the accused of a previous or subsequent offence has been frequently before the Courts, and as these decisions have a direct bearing upon the present case it may be convenient to collect together in one report the various rules which have been formulated by which the admissibility of such evidence may be tested. In *Rex v. Mean* (1) Wills J. called attention to a fact, which is sometimes overlooked, that the laws of evidence are the same in civil and in criminal cases. In *Rex v. Fisher* (2) Channell J. puts the point thus. He says: "The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence." As here pointed out by Channell J., the governing rule must always be that any evidence to be admissible must be relevant to the issue.

The most recent decisions which lay down rules by which the relevancy of evidence which tends to prove offences other than those covered by the indictment may be tested are the following. In *Makin v. Attorney-General for New South Wales* (3) Lord Herschell L.C. lays down the rule in these words: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed

(1) (1904) 69 J. P. 27; 21 Times L. R. 172.

(2) [1910] 1 K. B. 149, at p. 152.

(3) [1894] A. C. 57, at p. 65.

the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." In *Rex v. Bond* (1) Darling J. at p. 409 and Bray J. at p. 417 call attention to the fact that Lord Herschell's last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the Lord Chancellor should be read with that limitation. In the same case Bray J. at p. 414 says that "a careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads: (1.) Where the prosecution seeks to prove a system or course of conduct; (2.) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; (3.) where the prosecution seeks to prove knowledge by the prisoner of some fact." In their judgments in that case it is pointed out by several of the learned judges who formed the majority of the Court that a single prior act of a like criminal nature would in general not be admissible as evidence of a system. In the more recent case of *Rex v. Ball* (2) the Lord Chancellor, in speaking of the grounds upon which he held that the evidence there objected to was admissible, says: "Further evidence was then tendered to shew that these persons had previously carnally known each other and had a child in 1908. The object was to establish that they had a guilty passion towards each other, and that therefore the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, or—which is the same thing in another way—that the defence of innocent living together as brother and sister ought to fail." The first ground given by the Lord Chancellor for the admissibility of the evidence suggests an extension of the rules indicated in the cases above referred to; but the second ground comes within the rule previously indicated that evidence is admissible to rebut a defence really in issue.

(1) [1906] 2 K. B. 389.

(2) [1911] A. C. 47, at p. 71.

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In summing up to the jury in the present case the learned judge, in referring to the evidence which is now objected to, puts the case in this way. He says: "Then he (the appellant) goes away, and the next thing that is heard is that hardly a stone's throw off the farm lives a woman with whom he has already had immoral intercourse. The suggestion of the prosecution is that he was raging with lust, and that, being foiled as regards the prosecutrix Miss Jones, he immediately went to gratify his passion upon the woman who he knew would not be unwilling to yield."

Is the evidence objected to admissible upon the ground thus indicated by the learned judge, or under any of the rules formulated in the cases above referred to? This Court is of opinion that the evidence is not admissible. At the point in the trial at which the evidence was tendered the defences really in issue were: (1.) That the appellant never broke into the house at all; (2.) that the appellant did not break into the house with any intention of committing a rape; (3.) that the prosecutrix's story as to what occurred in the house was not true.

The evidence which was objected to was not, in the opinion of this Court, relevant to any of those issues, and was not therefore admissible to rebut any of the above defences. If the jury believed the evidence of the prosecutrix, the only issue was as to whether, in the opinion of the jury, the acts of the appellant amounted to an attempt to rape, and whether from his acts the jury would infer that the appellant broke into the house with the intention of committing a rape. In the opinion of this Court upon neither of those issues was the evidence objected to relevant. The conclusion therefore arrived at by this Court is that the evidence objected to was not admissible on any ground and ought to have been rejected.

The question then arises whether this is a case in which this Court can take advantage of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and say that in spite of the admission of the evidence there has been no substantial miscarriage of justice. Upon this question the Court of Criminal Appeal is always at somewhat of a disadvantage as compared with the judge who heard the case and who saw the witnesses and was acquainted

with the impression made by those witnesses upon the jury. The rule adopted by this Court, however, has been that it will not act upon the proviso in any case in which it appears to it clear that the jury may have been influenced by the evidence wrongly admitted. The Court is unable in the present case and upon the materials before it to say that the jury may not have been so influenced, and the decision, therefore, is that the conviction must be quashed.

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Conviction quashed.

Solicitor for prosecution: *Director of Public Prosecutions.*

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

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TEWKESBURY UNION *v.* UPTON-ON-SEVERN UNION.

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 Oct. 15.

Poor Law—Settlement—Irremovability—Residence—Child under Sixteen Years—Father receiving Poor Law Relief—Poor Removal Act, 1846 (9 & 10 Vict. c. 66), ss. 1, 3—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34.

A child under the age of sixteen years living for three years with its father in a parish from which the father is irremovable may acquire a settlement in that parish under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, notwithstanding that the father through having received poor law relief may be disqualified from acquiring a settlement in the same parish.

Hackney Union v. Kingston-upon-Hull Incorporation for the Poor [1912] A. C. 475, followed and applied.

CASE stated by the Worcestershire Quarter Sessions on appeal from an order of justices as hereinafter appearing.

1. The appeal was by the guardians of the Tewkesbury Union against an order made by and under the hands and seals of R. S. Bagnall and J. S. Cowley, two of His Majesty's justices of the peace acting in and for the county of Worcester, and bearing date January 5, 1911, whereby it was adjudged that the place of settlement of Walter Charles Burrows, hereinafter called the lunatic, then chargeable to the Upton-on-Severn Union, was in the parish of Boddington in the Tewkesbury Union; and that the guardians of the poor of the Tewkesbury Union should pay

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certain sums for the past and future maintenance and other expenses incurred in respect of the lunatic.

2. The grounds of appeal included the following :—

(b) That the lunatic was not last legally settled in the parish of Boddington or in any other parish or place in the Tewkesbury Union by parentage or otherwise.

(c) That the lunatic resided for the term of three years up to about May, 1900 (1), in the parish of Standish in the Wheatenhurst Union in the county of Gloucester in such manner and under such circumstances in each of such years as to render him irremovable, and that he thereby acquired a settlement in the said parish of Standish under the provisions of the statute 39 & 40 Vict. c. 61, s. 34. (2)

(1) In fact the period was up to May, 1901; see paragraph 10 of the case.

(2) Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1: "From and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years [now one year by s. 8 of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79)] next before the application of the warrant: Provided always, that the time during which . . . any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a bona fide charitable gift, shall for all purposes be excluded in the computation of time hereinbefore mentioned, and that the removal of a pauper lunatic to a pauper lunatic asylum, under the provisions of any Act relating to the maintenance and care of pauper lunatics, shall not be deemed a removal within the meaning of this Act: Provided always,

that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable."

Sect. 3: "No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child, from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish."

Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to

3. The following facts were proved to the Court.

4. The lunatic is a pauper lunatic duly certified and detained in the county asylum at Powick in the county of Worcester.

5. On November 6, 1909, when the lunatic was admitted to the said asylum, he was under the age of sixteen, having been born on April 9, 1894, but at the date of the order of justices appealed against, namely, January 5, 1911, he was over sixteen.

6. At the date of the lunatic's birth his father was residing in the parish of Staverton in the Cheltenham Union.

7. George Richard Burrows, the father of the lunatic, was born on December 1, 1872, and lived at Boddington for four years, namely, from October, 1887, to about June, 1891, with his parents, and worked during that time, and was eighteen and a half years old when he left Boddington.

8. While the father of the lunatic lived at Boddington he never received poor law relief for himself, but his father (the grandfather of the lunatic) had relief in the winter of 1887, and again in 1890, at which latter date G. R. Burrows was over sixteen years of age.

9. The father of the lunatic left Boddington in 1891 and resided at Gloucester for one year and seven months, but returned to Boddington in 1893 and remained there until March, 1894, when he went to Staverton, where he remained until August, 1894, and while there the lunatic was born.

10. In August, 1894, the father of the lunatic went to Taynton and remained there until September, 1896. On October 11, 1896, he went to Standish in the Wheatenhurst Union and remained there till May, 1901. There were three children born at Standish in the years 1897, 1898, and 1900. The father of the lunatic received medical relief for the first of these children, who

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be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise"

Sect. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise,

except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

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was born in June, 1897. He next had relief about November, 1897, when a child died and a child broke its collar bone. Neither of these children was the lunatic. Further relief was given in March, 1899, to a child other than the lunatic. In February, 1900, he received medical relief on his wife's confinement, and in January, 1901, he was given an order for medical relief.

11. In 1901 he went to Framilode and remained there for sixteen months, thence to Westbury until September, 1903, thence to Boddington until September, 1904.

12. He then went to Toddington (1) and remained there until September, 1908. While at Toddington he received poor law relief in December, 1905, for a broken leg, so did not live there for the term of three years without receiving relief.

13. It was proved by the production of the relief order book of the Wheatenhurst Union in which the parish of Standish is situate that for the quarter ended March, 1899, the lunatic's father received medical relief, that in February, 1900, he received medical relief on his wife's confinement, and that again in 1901 he also received medical relief.

14. Under these circumstances the Court found as a fact that the lunatic's father had obtained a settlement in the parish of Boddington by residing there for three consecutive years without receiving poor law relief, that Boddington was his settlement when the lunatic was born, and that in none of the subsequent residences had he resided for a sufficiently long period without the receipt of poor law relief to acquire a settlement by residence.

15. It was admitted by counsel for the appellants that this was so in all the parishes except Standish.

16. It was further admitted that in the parish of Standish the father had not himself acquired a settlement, he having received poor law relief on behalf of his wife and children during the periods he resided there.

17. It was, however, contended that the lunatic having never personally received relief while living in the parish of Standish

(1) In the Winchcombe Union of the county of Gloucester. It was not necessary to decide whether the lunatic acquired a settlement in this parish.

acquired a status of irremovability although he was under the age of sixteen years at the time his father began to reside there, and was removed to the asylum before he attained the age of sixteen ;

18. That after attaining sixteen years of age, although then living elsewhere, his previous residence in the parish for three years without receiving poor law relief was enough to enable him to acquire a settlement although living with his father, who was unable to obtain a settlement by reason of his receipt of poor law relief for other members of his family.

19. It was not proved that the lunatic had ever expressly received poor law relief, but it was proved that relief was given to the father of the lunatic at intervals during the time the lunatic was residing with him ; so unless the lunatic while living with his father could count the time he resided in Standish when under sixteen towards the time necessary to acquire a settlement he did not acquire a settlement.

20. The Court on the above facts decided : (i.) That the father of the lunatic had acquired by residence a legal settlement in the parish of Boddington which had never subsequently been displaced ; (ii.) that the lunatic had not after attaining the age of sixteen acquired a settlement for himself in the parish of Standish or elsewhere.

21. The Court therefore held that the settlement of the lunatic at the time he was removed to the asylum was the settlement of his father, namely, the parish of Boddington, and that therefore the order appealed against was right, and they therefore dismissed the appeal.

22. The appellants being dissatisfied with this decision asked the Court to state this case for the opinion of the High Court. The questions were : (i.) Whether the father of the lunatic being legally settled in the parish of Boddington before his son the lunatic became sixteen the lunatic could acquire before attaining sixteen any settlement other than that of his father ? (ii.) Assuming that the period during which an infant lives with his father in a parish before he attains the age of sixteen can be counted towards the three years necessary to enable the lunatic to acquire a settlement in such parish, does the fact of the father having

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received poor law relief, which would disqualify him from acquiring a settlement, also disqualify a son who was living with the father during such time in the absence of any evidence that the relief was ever given expressly to or shared in by the son?

23. If the High Court should be of opinion that the first of the above questions should be answered in the negative and the last in the affirmative the order of the Court of quarter sessions was to stand; but if otherwise the order was to be quashed.

Danckwerts, K.C., and H. Davey, for the Tewkesbury Union. Two questions are raised in this case: First, whether a child under sixteen years of age can acquire any settlement other than that of his father. That question has been decided in the affirmative by the House of Lords in *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor*. (1)

The second question is whether the fact that the father is disqualified from acquiring a settlement in a given parish prevents the son from acquiring a settlement in that parish. That question is really answered by the answer to the first question. It is the same question as the first but in different words. The facts are that the father of the lunatic went to Standish in the Wheatenhurst Union on October 11, 1896. He had relief on account of the confinement of his wife. For the purposes of removability the period during which relief is given and received is deducted from the time which is necessary to confer irremovability: see Poor Removal Act, 1846, s. 1. One year's residence now confers irremovability: Union Chargeability Act, 1865, s. 8. Therefore in October or November, 1897, the father of the lunatic became irremovable from Standish. So the lunatic became irremovable: Poor Removal Act, 1846, s. 3.

In October or November, 1899, the lunatic, having resided for three years in Standish in such manner and under such circumstances in each of such years as would under the several statutes in that behalf render him irremovable, was by s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, to be deemed to be settled in Standish: *Fulham Parish v. Woolwich Union* (2); *Hackney Union v. Kingston-upon-Hull Incorporation*

(1) [1912] A. C. 475.

(2) [1907] A. C. 255.

for the Poor. (1) It may be admitted that the father, through having received parish relief, failed of acquiring a settlement in Standish; but when once it was decided that a child can acquire, and when the facts are such that the child has acquired, an independent status of irremovability and an independent settlement, the settlement of its parent becomes immaterial. The result is that the lunatic must be deemed to have been settled in the Wheatenhurst Union, and the appeal of the Tewkesbury Union should be allowed.

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Macmorran, K.C., and Milward, for the Upton-on-Severn Union. It must be admitted that the first question is covered by the decision in *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor.* (1) As to the second question, it would be a strange conclusion that a father may have his settlement in one parish and his child under the age of sixteen years an independent settlement in another parish. This point has never been decided in terms, and does not seem consistent with the policy of the Poor Law Acts as indicated by s. 3 of the Poor Removal Act, 1846, or s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876.

LORD ALVERSTONE C.J. The first question asked by the Court of quarter sessions is admittedly answered by the decision of the House of Lords in *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor.* (1) That question is "whether the father of the lunatic being legally settled in the parish of Boddington before his son, the lunatic, became sixteen, the lunatic could acquire before attaining sixteen any settlement other than that of his father?" The father had resided in Standish for the time necessary to render him irremovable therefrom. The lunatic resided with his father in Standish for three years after his father had become irremovable therefrom, the lunatic being during this time under the age of sixteen. The House of Lords in the case I have mentioned decided that a legitimate child under the age of sixteen may independently acquire a status of irremovability, and consequently, under the requisite conditions, a settlement. The same applies to an

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illegitimate child: *Fulham Parish v. Woolwich Union* (1); although that is not material in the present case, the lunatic being a legitimate child. The first question, therefore, must be answered in the affirmative.

The second question is not in terms covered by authority. It is "Assuming that the period during which an infant lives with his father in a parish before he attains the age of sixteen can be counted towards the three years necessary to enable the lunatic to acquire a settlement in such parish, does the fact of the father having received poor law relief, which would disqualify him from acquiring a settlement, also disqualify a son who was living with the father during such time in the absence of any evidence that the relief was ever given expressly to or shared in by the son?" Applying loyally the decisions of the House of Lords we must hold that, if a son resides in a parish with his father who has become irremovable, the son acquires an independent irremovability under s. 3 of the Poor Removal Act, 1846; and the fact that the father through the receipt of poor law relief may be debarred from acquiring a settlement in the parish cannot be held to destroy the settlement which the son is deemed to have acquired under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, after three years of independent irremovability. It follows that the lunatic in this case must be deemed to have been settled in the parish of Standish in the Wheatenhurst Union, at any rate until he acquired a settlement, if he ever did so, in some other parish. The contention of the Tewkesbury guardians is right and this appeal must be allowed.

CHANNELL and AVORY JJ. concurred.

Appeal allowed.

Solicitors for Tewkesbury Union: *Surr, Gribble, Nelson & Oliver, for Brookes & Badham, Tewkesbury.*

Solicitors for Upton-on-Severn Union: *Ford & Ford.*

(1) [1907] A. C. 255.

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July 22, 30.

Licensing Acts—Sale of Intoxicating Liquor—New On-Licence—Conditions—Monopoly Value—Annual Payment—Percentage of Gross Takings—Licensing Justices—Jurisdiction—Grant of Licence “in accordance with” Act—Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 1; s. 14, sub-s. 1 (a).

Sect. 14, sub-s. 1 (a), of the Licensing (Consolidation) Act, 1910, provides that, on the grant of a new justices' on-licence, the justices shall attach such conditions as they think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed.

On the grant of a new on-licence the justices attached as a condition that the sum to be paid as monopoly value should be an annual sum representing a percentage of each year's gross takings from the sale of intoxicants. The collector of Inland Revenue refused to grant to the licence-holder an excise licence on the ground that the justices, in fixing the monopoly value by way of an annual payment of a percentage of the takings, had not granted their licence in accordance with the Act:—

Held by Bray and Lush JJ. (Avory J. dissenting), that monopoly value as defined by s. 14 can only be a definite capital sum, and that the justices had no jurisdiction to attach the above condition to the grant of the licence, and that the grant of the excise licence had, therefore, been rightly refused.

RULE NISI to the Commissioners of Customs and Excise and to the collector of Customs and Excise at Sunderland in the county of Durham to shew cause why a writ of mandamus should not issue directed to them commanding them to grant to one Jenkins an excise liquor licence in respect of the Royal Hotel, Horden, in the said county.

The circumstances in which the rule nisi was granted were as follows: On March 11, 1911, Jenkins applied to the justices for the South Division of Easington Ward, in the county of Durham, for a provisional grant of a new on-licence for a public-house to be known as the Royal Hotel at Horden. The justices granted the licence, subject to the following conditions:—(1.) That the sum to be paid as monopoly value for the first year in which

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trading should be carried on should be at the rate of 400*l.* per annum and should be calculated from the time trading commenced until the expiration of the licensing year. (2.) (a) That if trading should be carried on during the whole of the first year, 5 per cent. of the actual first year's gross takings from intoxicants should be paid as monopoly value for the second year, but in the event of the sum representing such percentage being less than 400*l.* an abatement should be allowed equivalent to the difference between the sum representing such percentage and 400*l.* (b) That if the trading should be carried on during part only of the first year, 5 per cent. of the estimated gross takings from intoxicants for the whole of the first year should be paid as monopoly value for the second year, such estimated gross takings being calculated in proportion to the actual takings for that part of the first year during which trading should have been carried on, but in the event of the sum paid as monopoly value for such part of the first year exceeding a sum representing 5 per cent. upon the actual gross takings from intoxicants during such part of such year the holder of the licence should be entitled to an abatement equal in amount to such excess. (3.) That the holder of the licence should after the second year pay as monopoly value during each year in which the licence should remain in force a sum representing 5 per cent. of the previous year's gross takings from intoxicants. (4.) That for the purpose of calculating the above percentage the holder should keep proper books of account shewing all amounts received at or in respect of the licensed premises.

On April 7, 1911, Jenkins applied to the confirming authority for the county of Durham for confirmation of the provisional grant, and they duly confirmed it subject to the following variation of the conditions attached thereto, namely, by the substitution of 7½ for 5 per cent. of the gross takings from intoxicants as the payment of monopoly value.

On November 18, 1911, Jenkins applied to the justices for a final order, which was duly made under s. 33, sub-s. 2, of the Licensing (Consolidation) Act, 1910.

Jenkins subsequently applied to the collector of Inland Revenue at Sunderland for the excise licence. The collector, acting on the instructions of the Commissioners of Customs and Excise, refused

to issue an excise licence in respect of the Royal Hotel on the ground that monopoly value as defined in the Licensing (Consolidation) Act, 1910, was not capable of being measured by a percentage of takings, and that the justices' licence had not been granted in accordance with, and did not comply with the requirements of, s. 14 of the Act (1), inasmuch as the justices had not determined the amount of the monopoly value, or of the payments to be made in respect of monopoly value, or attached to the grant of the licence the conditions required by s. 14 for securing to the public the monopoly value of the Royal Hotel.

Sir Rufus Isaacs, A.-G., and *Dalry*, for the defendants, shewed cause against the rule. The justices have no power under s. 14 of the Licensing (Consolidation) Act, 1910, to fix the monopoly value at an annual percentage of the gross takings derived from the sale of intoxicating liquor, and the grant of a licence with the monopoly value fixed in that way is not a grant "in accordance with, the Act" within s. 1, and, therefore, the grant of, an excise licence was rightly refused. The monopoly value is a definite capital sum: *Commissioners of Inland Revenue v. Truman, Hambury, Buxton & Co., Ltd.*, per Lord Haldane L.C. (2). It cannot be a sum varying from year to year according to the industry and business ability of the licence-holder, for according to s. 14 it is represented by "the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." Value in this connection does not mean annual value. Similar words are

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(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14: "(1.) The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—

"(a) Such conditions shall in any case be attached as having regard to proper provision

for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed;"

(2) [1913] A. C. 650.

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also used in s. 20 with regard to the compensation payable if the renewal of an old on-licence is refused, and in s. 44 of the Finance (1909-10) Act, 1910, with regard to the valuation of licensed premises for the purpose of the duty, and it is obvious that for those purposes a capital sum is to be ascertained. No reason can be suggested for giving a different meaning to the same words when they are used in s. 14 with reference to the monopoly value. No doubt the justices may direct that the payment of monopoly value may be made by annual instalments, but the words "the amount of any payments" in s. 14, sub-s. 1 (b), clearly point to the payment of a definite sum. Further, there is no provision in this Act (as there is in s. 49 of the Finance Act of 1910) requiring the licence-holder to keep or to produce books of account, and there are no means by which the amount of the gross takings can be ascertained. [*Ashby's Cobham Brewery Co.'s Case* (1) was referred to.]

Danckwerts, K.C., and *Konstam*, for the appellant, in support of the rule. Under s. 14 the licensing justices have to attach to the grant of the licence such conditions as to payments to be made and the tenure of the licence as they think "best adapted for securing to the public the monopoly value." Under sub-s. 2 of s. 14 a licence may be granted for a fixed term not exceeding seven years, and in that case it may be that the best course would be to fix the monopoly value at a capital sum, but there is nothing in s. 14 which compels the justices to adopt that method. If in their opinion the monopoly value can be best secured to the public by the payment of an annual sum based on a percentage of the takings, they are entitled to impose that condition. The renewal of an annual licence can be refused at any time, and, if the monopoly value has been fixed at a capital sum payment of which is spread over several years, in the event of the non-renewal of the licence the monopoly value would not be secured to the public. The word "value" in s. 14 may be construed to mean either capital or annual value. The question which method shall be adopted in any particular case is one for the decision of the justices. In *Commissioners of Inland Revenue v. Truman, Hanbury, Buxton & Co., Ltd.* (2) the question was as to the

(1) [1906] 2 K. B. 754.

(2) [1913] A. C. 650.

meaning of the proviso to s. 44 of the Finance Act of 1910, and the observations of the Lord Chancellor as to monopoly value were merely obiter. In the case of compensation under s. 20 it must necessarily be a capital sum, for the licence has terminated, but it is to be observed that the language of s. 20 is not identical with that of s. 14, for s. 20 speaks of "a sum equal" to the difference between the value of the premises licensed and unlicensed, whereas in s. 14 the language is "any monopoly value which is represented by the difference."

Secondly, even if the licensing justices were wrong in thinking that they were entitled to fix the monopoly value at an annual percentage of the gross takings, that, in the words of Brett L.J. in *Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire Ry. Co.* (1), "was a wrong decision upon a point of law arising in a matter which is within their jurisdiction," and it does not prevent the justices' certificate from having been granted "in accordance with" the Act, within the meaning of s. 1, for that only means granted by the justices in the exercise of their jurisdiction under the Act. If the justices in the exercise of their jurisdiction make a mistake, either of fact or of law, the grant of the licence is none the less valid. In *Rex v. Commissioners of Income Tax for City of London* (2) Lord Alverstone C.J. said: "It has long been recognized that where a tribunal of this kind acts within their jurisdiction on a matter properly before them, although they have gone wrong in law in the way they have applied the rules of law to their judgment, or have gone wrong in fact, it is not for us to interfere." [*Reg. v. Ingham* (3) and *Elston v. Rose* (4) were also referred to.]

Sir Rufus Isaacs, A.-G., in reply. The jurisdiction of the justices is to grant a licence upon certain conditions, one of which is the securing of the payment of monopoly value. Assuming that monopoly value as defined by the Act means a capital sum, the justices are exceeding their jurisdiction if they grant a licence on condition of a varying annual payment depending on a

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(1) (1880) 3 Ry. & Ca. Tr. Cas. 426, at p. 443. (2) (1904) 91 L. T. 94, at p. 97.
(3) (1888) 21 Q. B. D. 47.

(4) (1868) L. R. 4 Q. B. 4.

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percentage of the takings. [He referred to *Board of Education v. Rice*. (1)]

Cur. adv. vult.

July 30. BRAY J. read the following judgment:—In this case the applicant, Mr. James Jenkins, asked to have made absolute a rule nisi which had been granted calling on the Commissioners of Customs and Excise to shew cause why a writ of mandamus should not issue commanding the Commissioners to grant to him an excise licence in respect of the Royal Hotel, Horden, on the ground that he was legally entitled to the licence and it had been wrongfully refused.

It appeared from the affidavit in support of the application that the justices had provisionally granted a new on-licence in respect of the Royal Hotel, subject to conditions set out in the affidavit relating to payment of monopoly value. The conditions required were as follows: [The learned judge read the conditions as above set out, and continued:] These conditions, we were informed, were common conditions in the county of Durham, which makes the case one of considerable importance.

On April 7 the confirming authority confirmed the grant subject to the substitution in the conditions of $7\frac{1}{2}$ per cent. for 5 per cent. on the gross takings. Mr. Jenkins then applied to the Commissioners for an excise licence, which the Commissioners refused on the ground that the justices' licence had not been granted in accordance with the Act, that is, the Licensing (Consolidation) Act, 1910. The objection made by the Commissioners was that the conditions as to the payment of monopoly value were not in accordance with the provisions of s. 14; and it was contended before us by the Attorney-General, who appeared on their behalf, that, on the true construction of the section, (a) the monopoly value was a capital value, not an annual value; (b) the payments to be made were to be payments of fixed sums, not of sums to be ascertained according to future takings; (c) that the justices, not having observed the conditions, had not granted the licence in accordance with the Act. Mr. Danckwerts for the applicant disputed this construction of the section and

further argued that if the justices had wrongly construed the section they had acted within their jurisdiction, and that the licence they granted was in accordance with the Act, unless it could be shewn that they had exceeded their jurisdiction.

Now, first, as to the construction of s. 14. "The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—(a) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." The rest of the section is unimportant except the words "in estimating," which shews that the values were to be estimated. Now, the monopoly value is to be represented by the difference between the value which the premises will bear when licensed and their value if not licensed. Does "value" mean capital value or annual value? When one speaks of the value of property, one does not mean annual value, and it matters not whether the property is a house or a parcel of goods or a piece of furniture. The public were to have secured to them the payment of the monopoly value, or the value of the monopoly. It was to be estimated and fixed by the justices once for all. With the help of experts there is no great difficulty in estimating it. It has to be done in assessing the compensation under s. 20, and though in the case of an existing licence you have actual profits to work upon, expert valuers, given the position and the character of the neighbourhood and the number of public-houses within a certain distance, can say very approximately what the value of the new licence will be. Licensed property, as is well known, has a market value, and the object of the section was to secure to the public the increased market value given to it by the grant of the licence. It is true that the licence is only granted for a year, and has to be annually renewed, but, notwithstanding

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that and notwithstanding the risk of not obtaining a renewal, the first grant of the licence gives an additional value to the house which can be realized directly it has been granted. It seems to me that, giving the word "value" its ordinary meaning, it means capital value, and when the object of the section is considered the meaning becomes still clearer. Is there anything in the rest of the section or the other parts of the Act which should lead us to give it a different meaning?

Our attention was called to sub-s. 1 (b) of s. 14: "The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value." The total payments imposed by the conditions are not to exceed the monopoly value. The payments may be, and often would be, annual payments; the total of these are not to exceed the monopoly value. That indicates to my mind that the monopoly value is to be a total or capital value. Then we find that the same expression is used in s. 20, which deals with compensation, "a sum equal to the difference between the value of the licensed premises . . . , and the value which those premises would bear if they were not licensed premises." Beyond all doubt "value" in this section means capital value. Then we have ss. 37, 38, and 39 and the Fifth Schedule, which contain provisions as to annual value, and it is there called "annual value." This seems to shew that when the Act is dealing with annual value it calls it annual value. Mr. Danckwerts found a difficulty in saying that the monopoly value could not be a capital value, and said that "value" meant "capital or annual value," and that the justices might find an annual monopoly value or a capital monopoly value. This seems to me an impossible construction. "Value" cannot mean annual value and capital value; it must mean one or the other; and, in my opinion, it clearly means capital value. It was contended that it would be much better and fairer and easier to estimate the annual value. I am not sure that this would be so, but we have to decide what the Legislature meant, not what it would have meant if it had been better advised. I am fortified in the conclusion at which I have arrived by the opinion of the Lord Chancellor in *Commissioners of Inland Revenue v. Truman*,

Hanbury, Buxton & Co., Ltd. (1) He says there: "Sect. 14 of the later Act"—that means the Act of 1910—"substantially re-enacts s. 4 of the older Act, and more nearly resembles, both in what it deals with and in its language, the provision under consideration. It aims at securing, on the grant of a new on-licence, payment in the interest of the public for what it terms the monopoly value. This it defines as the difference between the value which the premises will bear in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed. But, unlike s. 20, it contains a proviso closely resembling in its language the one which we have to construe. For, in estimating the value of licensed premises, where the profits are not wholly derived from the sale of intoxicating liquor, it directs that no increased value arising from profits not so derived is to be taken into consideration. My Lords, s. 14 deals, not with the annual value of the licence, but with its capital value." Now it may be said that this is only a dictum, and perhaps that may be so, but it is the considered opinion of the Lord Chancellor as to the true construction of s. 14.

Next, may the amount of the payments be regulated by future takings? The section seems to contemplate that the justices are to fix the payments once for all. How can they say whether they will secure to the public the monopoly value, or that they will not exceed it, unless they know what the future takings are going to be? If the management is below the normal, or if the licensee prefers for his own reasons to force the sale of non-intoxicants in preference to intoxicants (and there is no obligation on him to force the sale of intoxicants), the payments will diminish and the public will not be secured in getting the monopoly value. If, on the other hand, the management is above normal, the payments will exceed the monopoly value. In either of these cases the conditions will not comply with the provisions of s. 14. I infer that the object the justices had in view was to encourage the sale of non-intoxicants, a praiseworthy object, but not the object provided for by the statute, which was to secure the public receiving the full monopoly value. It is true that in estimating the monopoly value the justices were not to take into

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(1) [1913] A. C. at pp. 658, 659.

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account any increased value through the sale of non-intoxicants, but once they had fixed the monopoly value they had no right to diminish the chance of the public receiving that value by making it dependent upon the quantity of intoxicants actually sold. The owner of the house had its market value increased by reason of the licence, and the public were to receive that increased value, which was to be estimated in the manner provided. Again, these conditions would involve a fresh ascertainment every year, and no machinery is provided for any such ascertainment. The licensee is to keep books, but if his entries are not accepted there must be an inquiry and ascertainment of the actual gross takings. There is no provision in the Act for any such inquiry or ascertainment. Sub-s. 3 of s. 14 contemplates that the amount will have been already fixed by the conditions. In my opinion, s. 14 contemplated that the justices should first fix the capital monopoly value, and then they should provide in the conditions how that should be paid. It would be in their discretion to say by what payments the monopoly value should be paid, but they must fix payments of a certain, not an uncertain, amount.

I now come to the last point. It is conceded, I think, but if not conceded it seems to be clear, that if the justices have gone beyond their jurisdiction the licence has not been granted in accordance with the Act. Now, in my opinion, the justices here have exceeded their jurisdiction. Mr. Danckwerts admitted, as he was bound to admit, that if the justices fixed no conditions they would have exceeded their jurisdiction; does it not equally follow that, if they fix conditions which do not comply with s. 14, they have also exceeded their jurisdiction? I think it does. As I have already stated, they have to fix the conditions with reference to the monopoly value, which is to be a capital value, and they obviously cannot do this without first ascertaining this capital monopoly value. I think the conditions they imposed shew that they never did ascertain a capital monopoly value. They misconstrued the statute. They thought it allowed them to fix an annual monopoly value and to make the payments depend upon takings. The whole argument addressed to us by counsel was that the section entitled them to do this. It was, in my

opinion, a necessary preliminary to their jurisdiction to impose conditions that they should first ascertain the capital monopoly value, and they had no jurisdiction to fix conditions to be imposed until they had done so. It was said that they might exercise their discretion in imposing conditions best adapted to securing to the public the monopoly value. Yes, but how could they determine what conditions were best adapted until they had fixed the monopoly value? Equally I think they exceeded their jurisdiction when they made the payments proportionate to future takings. Takings may be an element in arriving at the value of licensed premises, but they are only one of the elements. They form an element in the calculation of the value of the business carried on upon the premises, but the value of the business carried on is only one element in the calculation of the value of the premises. They have not applied themselves to the consideration of the right questions. In *Board of Education v. Rice* (1) Lord Loreburn said: "But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari"; and (2): "They have purported to determine a question under s. 7, sub-s. 3, of the Act which I do not think was really that which arose between the parties." Several cases were cited, but, in my opinion, they were all distinguishable and none of them were in conflict with the opinion of Lord Loreburn which I have just quoted. The question here is whether they have granted the licence in accordance with the Act, and in my opinion they have not. The rule must be discharged.

AVORY J. read the following judgment:—I regret that I am unable to concur in the judgment pronounced by my Lord, with which I understand my brother Lush agrees.

This is an application for a mandamus to the Commissioners of Customs and Excise and to the collector at Sunderland to grant and deliver to the applicant an excise licence for the sale of intoxicating liquor at the Royal Hotel, Horden, in the county of Durham. The Commissioners have refused to grant this licence,

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(1) [1911] A. C. at p. 182.

(2) Ibid. at p. 184.

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and the question is whether the applicant is legally entitled to receive it: see 6 Geo. 4, c. 81, s. 6. The applicant holds a justices' licence purporting to authorize him to hold this excise licence, and the Commissioners justify their refusal on the ground that the justices' licence was not granted in accordance with the Licensing (Consolidation) Act, 1910: see s. 1 of that Act.

The justices' licence was a provisional grant of a new justices' on-licence granted under ss. 14 and 33 of the Act of 1910, which was confirmed by the confirming authority and declared to be final by an order of the licensing justices under s. 33, and attached to the said licence as finally determined by the confirming authority were conditions which may be described generally as providing that the monopoly value referred to in s. 14 should be calculated at the rate of 400% per annum for the first year in which trading was carried on, and in subsequent years at a percentage on the gross takings. It is contended on behalf of the Commissioners that these conditions are not in compliance with s. 14, that the monopoly value there referred to is a capital amount or total sum of money to be determined by the licensing justices at the time of the grant of the licence, representing the capitalized value of the difference between the value of the premises if licensed and their value if not licensed, for some uncertain number of years, but it is admitted that the payment of this total sum may be spread over some number of years in instalments. Having regard to the facts that the licence in question is an annual licence, and that, being granted since the year 1904, the renewal may be refused in the discretion of the licensing justices at the end of the first or any subsequent year without assigning any reason, and that the licensing justices themselves may change from year to year, it is difficult to suggest any principle of valuation upon which such capitalized value can be calculated; but assuming that it may be arrived at in some haphazard way, and assuming that it would be competent for the licensing authority to impose as a condition the payment of such capitalized value in one sum or in instalments, the question to be determined in this case is whether the confirming authority, in the bona fide exercise of their discretion, which is not questioned, had jurisdiction to impose the

conditions in question, which they must be taken to have thought were best adapted for securing to the public the monopoly value.

In my opinion the respondents cannot justify their refusal to grant the excise licence unless they establish at least that the justices' licence was void. I doubt whether the words "granted in accordance with this Act" in s. 1 mean anything more than granted by the persons and at the times authorized by the Act, and to the persons qualified to hold such licences. It may be that a licence granted by justices under s. 14, which imposed no condition for securing to the public the monopoly value, would be void; but the confirming authority, by whom this licence, with its conditions, was finally granted, is the Court of quarter sessions for the county: see s. 2, sub-s. 2, of the Act of 1910. As such they had jurisdiction to determine questions of law involved in the exercise of their discretion under this statute. I think the construction of the expression "monopoly value" was such a question, and not a matter preliminary to the exercise of their jurisdiction, and, even if they have put a construction upon it which this Court does not agree with, I do not think the Court can correct them: see *Reg. v. Middlesex Justices* (1); *Rex v. Inhabitants of Frieston* (2); *Rex v. Inhabitants of Cottingham* (3); *Reg. v. London Justices* (4); and until their decision is set aside by legal process, I think the excise authorities were bound to act upon it.

I am further of opinion that the conditions imposed in this case are adapted for securing to the public the monopoly value referred to in s. 14. The expression "capital value" or "capitalized value" does not appear in the section, and, even if it is to be implied, it is for the licensing authority to determine how it may best be secured to the public. These conditions secure to the public the payment of a sum in each year during the continuance of the licence, which the licensing authority have estimated represents the monopoly value, as defined in the section, in such year, which may vary from year to year according to the amount of trade done on the premises in the same way as the annual licence value of the premises for the purposes of s. 44

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(1) (1877) 2 Q. B. D. 516.

(3) (1834) 2 Ad. & E. 250.

(2) (1833) 5 B. & Ad. 597.

(4) [1895] 1 Q. B. 616.

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of the Finance Act, 1910, which is the same as the monopoly value, will vary, and the total of these sums may more fairly represent the capital value than any arbitrary sum fixed at the time of the grant of the licence, when it is impossible to estimate how long it may continue. Reliance has been placed on an expression used by the Lord Chancellor in delivering his opinion in the House of Lords in the case of *Commissioners of Inland Revenue v. Truman, Hanbury, Buxton & Co., Ltd.* (1), that monopoly value in s. 14 means capital value. I do not think this ought to be regarded as an authority on the point now under discussion, which was not in issue in that case; and I am not impressed by the argument of inconvenience to the excise officer in collecting the amount annually which is relied on in the affidavit in opposition to the rule, as the licensing justices have the power to refuse the renewal of the licence and would no doubt do so if the licensee failed to keep proper accounts or to render proper assistance in determining the amount to be paid in each year.

For these reasons I am of opinion that the justices' licence in this case was not void, that the respondents were not justified in refusing to grant the excise licence, and that the rule for the mandamus should be made absolute.

LUSH J. read the following judgment :—There are two questions for our consideration in this case. The first question is whether the justices in granting the new justices' on-licence have attached the necessary conditions for securing to the public the monopoly value of certain licensed premises in accordance with the provisions of s. 14 of the Licensing (Consolidation) Act, 1910, and, if not, whether they have acted without jurisdiction in granting the licence, or have only made a mistake while acting within their jurisdiction. In the former case the licence would be void; in the latter case it would not.

As to the first question, I am of opinion that the monopoly value has not been secured and the necessary conditions for that purpose have not been attached in accordance with the provisions of s. 14. That section defines what the monopoly

(1) [1913] A. C. 658, 659.

value is, and how it is to be arrived at. It is the sum represented by the difference between (a) the value which the premises will bear in the opinion of the justices when licensed, and (b) the value of the same premises if they were not licensed. The justices have therefore to ascertain this sum by valuing the two unknown quantities (a) and (b); the difference between them ((a) being, of course, assumed to be the larger) gives the result and fixes the monopoly value. Now the justices have to ascertain the value of these two unknown quantities by a prospective estimate, as the Lord Chancellor said in *Commissioners of Inland Revenue v. Truman, Hanbury, Buxton & Co., Ltd.* (1)

Sect. 14 speaks of (a) as being the value which the premises will bear "in the opinion of the justices," and it refers to their "estimating the value." It is clear, therefore, in my opinion, that before the justices can proceed to consider what conditions to attach to the licence they must have arrived at a definite sum, estimated, no doubt, but still a definite sum, which is the statutory monopoly value. Having done so, they have the widest discretion in framing conditions best adapted to securing the payment of that sum to the public. I cannot read that section without coming to the conclusion that the sum to be ascertained is the capital sum which represents the monopoly value. I should have thought that, when one speaks of the value which premises either do now bear or will bear when licensed, one refers to the sum which they would realize if converted into money, the market value, the sum which they are worth. One does not naturally think of that in the terms of rent, but in the terms of purchase-money. Sect. 20 and sub-s. 1 (b) of s. 14 point, I think, to the same conclusion. The Lord Chancellor expressed the opinion that the section referred to capital value in the case I have cited. Even, however, if the value were annual value, the justices have none the less to ascertain what it is by estimate. It would be a fixed and ascertained sum in either case.

Now, the conditions which the justices have inserted in the licence do not provide any method of securing the monopoly value, for the best of all reasons, that the monopoly value has not been ascertained at all. The two unknown quantities which must

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determine what it is have not themselves been ascertained or estimated. The justices have substituted a wholly different and unauthorized method of securing the payment of money to the public, the amount depending on the takings of future tenants. The monopoly value, not having been ascertained, has therefore not been secured; something else has been secured in its place. How is that a compliance with the Act? I will assume as we were told, though it is only an assumption, that a better and a fairer method has been adopted. But the justices' duty was to follow that prescribed by the Act, and not to invent a better one, and, as they have not done so, they have, in my opinion, granted a licence without complying with one of the conditions precedent to granting it.

I would point out, though I do not think it is necessary except for the inference to be drawn from it, that the Act contains no machinery for ascertaining what the takings of the future tenants may be. No inquiry into their books is provided for, and no investigation of the actual takings, if the books are not satisfactory. This omission points to the estimate being made at the time the licence is granted, and not to future calculations.

With regard to the second question, I think that the licence has not been granted in accordance with the Act, and that, therefore, the licensee is not entitled to the excise licence. The ascertainment of the monopoly value was a condition precedent to the attaching of the conditions contemplated by s. 14, and which are essential to the validity of the licence. The justices could not, by saying that they had determined it when they had not in fact done so, give themselves jurisdiction to settle and attach the conditions and grant the licence. The ascertainment of the monopoly value was, in my opinion, a preliminary step to be taken before the conditions for securing it could be considered.

I think, therefore, that they acted without jurisdiction, and that the rule must be discharged.

Rule discharged.

Solicitors for applicant: *Godden, Holme & Ward, for Newby, Robson & Robson, Stockton-on-Tees.*

Solicitor for defendants: *W. M. Graham-Harrison.*

F. O. R.

[IN THE COURT OF APPEAL.]

WOOTTON *v.* SIEVIER.

[1912 W. 3006.]

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May 31;

June 13.

Practice—Discovery—Libel—Justification—Particulars of Justification—Facts on which Defendant relies in support of Justification.

The plaintiff, an owner and trainer of racehorses, sued the defendants for libel, alleging in his statement of claim that the meaning of the libel was that the plaintiff had been guilty of gross dishonesty in the training and running of horses, and particularly that he had on several occasions conspired with other trainers and with jockeys to defraud bookmakers and owners of racehorses and the public generally for his own pecuniary gain. The defendants pleaded justification, and under an order made by the judge delivered particulars ranging over a period of three years, specifying a number of races, jockeys, and horses with the weights carried by them, and giving the names of certain trainers. The particulars further gave numerous instances of races in which horses were asserted to have been "pulled" by their jockeys, acting under the plaintiff's orders, with the result that other horses backed by the plaintiff had won. A summons for further and better particulars, naming the bookmakers with whom the plaintiff was alleged to have backed the horses in question and the amounts of the bets respectively, having been dismissed by the judge, the plaintiff appealed:—

Held, that the following rules were established, namely, that where a defendant raises an imputation of misconduct against the plaintiff, the plaintiff ought to be enabled to go to trial with knowledge of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation; and that if the particulars are such as the defendant ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of his witnesses.

Held, further, applying these rules, that the plaintiff in this case was entitled to have particulars of the names of the persons with whom or through whom the defendants proposed to prove that he had made the bets to which they intended to refer, and the places or times at which such backings took place. He was not, however, entitled to particulars as to the amounts of such bets.

APPEAL by the plaintiff from the refusal of Bailhache J. in chambers of an application by the plaintiff for further and better particulars of justification in an action for libel.

The alleged libel was contained in statements published by

C. A. the defendants in a newspaper called the *Winning Post*. The
1913 defendant Sievier was the writer of the libellous statements, and
WOOTTON the other defendants were the proprietors and publishers of
v. the newspaper. These statements were to the effect that there
SIEVIER. was a trainers' ring, and that the plaintiff and certain other
trainers had banded themselves together so that what should be
competitive stables were but little else than one establishment.
This allegation was followed by further statements and drawings
in the *Winning Post* which meant, and were understood to mean,
that the plaintiff had entered into a conspiracy with other trainers
to win or lose races by dishonest and illegitimate means and
in accordance with previous arrangements, and thereby to
defraud bookmakers and owners of racehorses and the public
generally.

The defendant Sievier pleaded justification. Particulars of the facts and matters relied on in support of this plea of justification had been ordered and delivered, and the question on this appeal was whether the particulars which had been delivered were adequate. A large portion of the particulars consisted of extracts from the *Racing Calendar* and dealt with what was called the in and out running of certain horses. By paragraph 1 of the particulars the defendants alleged that the plaintiff in fact trained horses which were nominally trained by other persons, and the horses apparently trained by the plaintiff's nominees did not in fact compete with the horses trained by the plaintiff, but the plaintiff determined which horse, whether trained in his own name or in the name of one of his nominees, was to endeavour to win the race for which it was entered, and such decision on the part of the plaintiff depended not on the merits of the horses entered for the race, but upon which horse he had backed. The plaintiff had been able to arrange as to which of the horses under his control should win by putting up either jockeys or apprentices in his own service to ride such horses. Paragraph 2 of the particulars alleged that the plaintiff had ordered his jockeys and apprentices to pull horses which they were riding when he was not backing the said horses, and his jockeys and apprentices had pulled the horses trained by or under the control of the plaintiff, and also horses trained by other trainers when the plaintiff was not backing such

horses. Then followed specific instances of the conduct alleged. Paragraph 3 of the particulars alleged that the plaintiff's son Frank Wootton was engaged by Sir William Bass, the owner of a horse called Stickup, to ride such a horse for the Cambridge-shire on October 29, 1907. The plaintiff backed a horse called Malua for the said race, and at some date unknown to the defendants ordered the said Frank Wootton to pull Stickup in the said race, so that it should not win, and the said Frank Wootton accordingly pulled the said horse so that it did not win. Paragraphs 5—12 of the particulars contained similar allegations with regard to other specified races.

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The plaintiff by his summons for further and better particulars asked for particulars naming the bookmakers with whom the plaintiff was alleged to have backed certain horses and the amounts of the bets respectively. Bailhache J. refused the application, and the plaintiff appealed.

McCardie, for the plaintiff. The question on this appeal is as to the sufficiency of the particulars of justification delivered by the defendant. The point arises especially on paragraph 3 of the particulars. It is submitted that the plaintiff is entitled to particulars giving the names of the bookmakers with whom he is alleged to have backed the horses. The charge against the plaintiff amounts to one of criminal conspiracy, and the plaintiff is entitled to know the names of the people whom he is alleged to have defrauded. It is vital to the plaintiff's case that he should have these particulars. Bailhache J. refused to order the defendants to give the particulars asked for on the ground that to give them would be to reveal the names of the defendants' witnesses. The rule as to particulars in actions for libel is more strict than in ordinary actions. When justification is pleaded of a charge of a criminal nature it must be pleaded with the utmost particularity. The plaintiff is embarrassed in meeting this serious charge unless he can get the particulars for which he asks. The defendants must give such particulars as will enable the plaintiff to know what case he has to meet: *Zierenberg v. Labouchere*. (1)

[KENNEDY L.J. referred to Odgers on Libel, 5th ed., p. 182.]

(1) [1893] 2 Q. B. 183.

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It was argued before Bailhache J. that the defendants ought not to be called on to give names because they would be giving the names of their witnesses. The same argument was used in *Zierenberg v. Labouchere* (1), but it did not prevail. *Marriott v. Chamberlain* (2) is conclusive upon that point. See also *Roselle v. Buchanan* (3), where it was held that in an action for slander particulars of the names of the persons to whom the alleged slander was uttered must be given. [He also referred to *Arnold & Butler v. Bottomley*, (4)]

Schiller, for the defendant *Siever*. It is not disputed that where the material allegations of fact involve the disclosure of names particulars must be given, but here it is submitted that all the material facts have been given in the particulars without the disclosure of names. The Court will not order the names of the defendants' witnesses to be disclosed. The essential fact in this case is that bets were made upon particular horses. The defendants have given all the particulars that can be required. It would be oppressive that they should have to give particulars of every bet and with whom made. They have given the names of the horses upon which the bets were made and the races in respect of which they were made. *Zierenberg v. Labouchere* (1) was very different from this case. Here the plaintiff in effect says "Tell me how you are going to prove what you allege against me." That is going further than the Courts have ever gone. *Marriott v. Chamberlain* (2) was also a very different case. The ground upon which the Court allowed the interrogatory there was that the party interrogated had by his allegations thrown himself open to being compelled to give the discovery asked for. Here the defendants have given all material particulars. Anything further is merely disclosing evidence. The order appealed from was right.

McCardie in reply. The plaintiff is entitled to know the names of the bookmakers whom he is alleged to have defrauded. The particularity required in such a case as this is as strict as in the case of an indictment. The plaintiff is really asking for particulars of a criminal charge which is made against him. At

(1) [1893] 2 Q. B. 183.

(2) (1886) 17 Q. B. D. 154.

(3) (1886) 16 Q. B. D. 656.

(4) [1908] 2 K. B. 151, 168.

present he does not sufficiently know the case which he has to meet.

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COZENS-HARDY M.R. Lord Justice Kennedy will deliver the judgment of the Court. (1)

KENNEDY L.J. The degree of fulness and precision which ought to be required in an action for libel from a defendant, who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate. Certain general propositions are now, I think, not open to controversy. In every case in which the defence raises an imputation of misconduct against him, a plaintiff ought to be enabled to go to trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged that he has committed and upon which the defendant intends to rely as justifying the imputation. This rule of justice is not limited in its application to actions of libel, although, of course, it includes them (see per Kay L.J., *Zierenberg v. Labouchere* (2)), and its propriety is most evident in a libel case where the defendant has chosen to put the character of the plaintiff in serious jeopardy by the heinousness of the charges which are asserted or involved in the defendant's plea of justification. In such a case, at all events, the pronouncement of Alderson B. in *Hickinbotham v. Leach* (3), approved of and explained in reference to the modern system of pleading by Lord Esher M.R. in *Zierenberg v. Labouchere* (4), is not one whit too strong: "The plea ought to state the charge with the same precision as in an indictment." Further, as a general rule, it is now, I think, established, that, if the particulars are such as the defendant ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of persons whom he may intend to call as witnesses at the trial: see per Lord Esher M.R., *Zierenberg v. Labouchere*. (5) At the same time, on an application by a

(1) Cozens - Hardy M.R. and Kennedy L.J. (3) (1842) 10 M. & W. 361, 364.

(4) [1893] 2 Q. B. at p. 187.

(2) [1893] 2 Q. B. at p. 190.

(5) *Ibid.* at pp. 187, 188.

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plaintiff for particulars, or for further and better particulars, the Court, before acceding to it, must be careful to see that the demand is not of a vexatious or oppressive character, or, the material facts being pleaded by the defendant in the statement of defence, or stated in particulars, if such have been delivered by him, with sufficient precision to enable the plaintiff to know and to prepare himself to deal with them, that the plaintiff is not covertly endeavouring to get something more to which he is not entitled, namely, the disclosure of the evidence to prove those facts which may be in the defendant's possession. Whilst, however, these general rules will not, I think, be challenged, the practical application of them is not always an easy task. The special circumstances of each case have to be carefully considered.

The material points in the present case are, in my judgment, these. The plaintiff, an owner and trainer of racehorses at Newmarket, is suing the defendants for libels which he alleges to have been published by them. The statement of claim asserts (to put the case shortly) that the meaning of the publications is that the plaintiff has been guilty of gross dishonesty in the training and running of racehorses, and particularly that he has on several occasions conspired with other trainers and with jockeys to defraud bookmakers and owners of racehorses and the public generally for his own pecuniary gain. Manifestly, if such is the meaning of the publications, the attack upon the character of the plaintiff, both personally and professionally, is one of the gravest sort. It imputes to him conduct which might form the subject of criminal proceedings. Such being the nature of the case, it appears to me to be one to which the pronouncement of Alderson B., quoted above, in *Hickinbotham v. Leach* (1) is peculiarly applicable. The defendants in their statement of defence, amongst other averments (including denials of all the allegations of the statement of claim), have pleaded an unqualified justification of the alleged libel with the defamatory meaning charged by the plaintiff in the statement of claim; and, under a judge's order, they have delivered particulars of the matters of justification. The question which this Court has to decide, on

(1) 10 M. & W. 361, 364.

the appeal of the plaintiff, is as to the sufficiency of these particulars on one point.

The particulars delivered range over a period of three years, i.e., from 1909 to 1912; the catalogue of facts begins in the autumn of 1907, i.e., more than five years ago. They specify a number of races, jockeys, and horses, with the weights carried by them, and give the names of certain trainers; and so far the plaintiff could not, and in fact does not, impeach the particulars on the ground of insufficiency. What he does complain of is that upon one important matter the particulars give him no information at all. There can be no doubt—indeed the particulars themselves shew it—that a most material part, if not the most material part, of the structure of the justification is the fact therein alleged, that the plaintiff's object in his dishonest arrangements with certain other trainers and with certain jockeys was on several occasions to procure the success of certain horses which he had backed. Such backing is asserted in paragraphs 3, 5, 6, 7, 9, 10, 11 and 12 of the particulars delivered. The plaintiff asks that he may have delivered to him such particulars of the betting transactions intended by this bare and general allegation of backing as will enable him to identify them—to know, that is to say, before the trial what are the betting transactions which he is accused of having entered into contrary to his honour and his duty, and upon which the defendants intend to found an allegation, on each of the specified occasions, of a corrupt interest. It appears to me to be just that the plaintiff should, in some form, be enabled to know the case he has to meet upon this point. Bets may be made directly or indirectly through agents; there may or may not be a contemporary written record. The backings alleged began nearly six years ago and range, as I have said, over a period of three years. Betting books, memoranda, and letters may easily in the course of such a time have been lost or destroyed. The plaintiff, as it seems to me, might be unfairly placed in a difficulty at the trial, if he does not know till then either the names of the persons with whom, or through whom, the defendants propose to prove that he made the bets to which they intend to refer, or the places or the times at which the betting transaction in each case is alleged to have taken place.

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There can be no hardship upon the defendants in ordering such further particulars as will sufficiently protect the plaintiff in this matter. If the defendants have no knowledge of the betting transactions to which the particulars refer under the general allegation of "backing," they have no justification for making the allegation. The plaintiff in his summons asked for particulars, naming the bookmakers with whom the plaintiff is alleged to have backed certain horses and the amounts of the bets respectively. The learned judge, with, as I understand, some hesitation, declined to accede to any part of the application. So far as relates to the amounts of the bets I concur in his decision. I do not see how the amounts of the bets can be material, and it is, I think, quite possible that there might be evidence of a bet upon which the defendants might properly rely (as, e.g., an admission), and yet that that evidence might not include knowledge of the amount of the bet. What, for the reasons I have stated, I do think, with sincere respect to the learned judge is, that the plaintiff is entitled to have is such information of the betting transactions upon which the defendants intend to rely in supporting the allegation of "backing" as will enable the plaintiff to know to what occasions it is intended to refer. For this purpose I think that our order should be for the delivery by the defendants within fourteen days of particulars of the "backing" by the plaintiff of horses mentioned in paragraphs 3, 5, 6, 7, 9, 10, 11 and 12 of the particulars already delivered, specifying, where possible, in each case the name or names of the person or persons with or through whom, and the time or times, place or places, at which, such "backing" took place. The costs here and below to be costs in the action. The form of the order will follow that of the original order in regard to giving evidence at the trial.

Appeal allowed.

Solicitors: *Lewis & Lewis; Wontner & Sons.*

G. A. S.

[IN THE COURT OF APPEAL.]

GREENLANDS, LIMITED *v.* WILMSHURST AND THE
LONDON ASSOCIATION FOR PROTECTION OF TRADE
AND ANOTHER.

[1910 G. 1732.]

C. A.

1913

April 25, 28,
29, 30;
July 18.

Libel—Privileged Occasion—Trade Protection—Mutual Society—Communication to Members not privileged—Privilege founded on the General Interest of Society—Joint Tort—Several Defendants—Form of Judgment.

An unincorporated body called the London Association for Protection of Trade was formed in 1842 for the purpose (inter alia) of making inquiries as to the commercial standing and credit of traders, and consisted of such persons as might be elected members, no particular qualification for membership being required. The business of the association was carried on under the superintendence of an unpaid committee of management. Members paid an annual subscription which entitled them to a certain number of inquiries free, and to a further number for an additional payment. The association had accumulated funds which by its rules had to be dealt with in furtherance of the objects of the association and no part of which had ever been divided among the members.

A member of the association applied for information as to the commercial credit of the plaintiff company. The secretary of the association applied to a third person for the information, who made a report, for which he was paid a fee, containing untrue and defamatory statements of the plaintiff company. The secretary sent a report in substantially the same terms to the member. In respect of the secretary's report the plaintiff company brought an action for libel against the association, the secretary, and the third person:—

Held by Vaughan Williams and Hamilton L.JJ. (Bray J. dissenting), that the report was not published on a privileged occasion.

Macintosh v. Dun [1908] A. C. 390, followed.

Waller v. Loch (1881) 7 Q. B. D. 619, distinguished.

Where there is a single cause of action against several defendants arising from a joint tort, and the defendants sever their defences, the jury have no power to sever the damages, and judgment cannot be entered against the several defendants for different amounts.

APPEAL from the judgment of Lord Alverstone C.J. at the trial of the action with a special jury.

The plaintiff company carried on business as drapers and general furnishers at Hereford. The defendant Wilmshurst was a debt collector carrying on business at Hereford. The defendants the London Association for Protection of Trade were an

C. A. unincorporated body formed in 1842, its objects being the
 1913 making of inquiries as to the means, respectability, and trust-

 GREEN- worthiness of individuals and firms; the collection of debts; the
 LANDS, detection and exposure of swindlers; the issue of gazettes con-
 LIMITED taining particulars of bills of sales, county court judgments,
 v. &c.; and to afford gratuitous legal advice to members on all
 WILMSHURST matters connected with their trading operations. The defendant
 AND THE Hadwen was the secretary of the association. The action was
 LONDON brought to recover damages for libel.
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The facts were as follows: One Shand Kydd, who was a member of the association and who was contemplating the supply of goods to the plaintiffs on credit, applied to the association in writing on a printed form, supplied to him by the association, for information regarding the plaintiffs in the following terms: "If safe for say £20/30, their mode of payment, length of credit and general information." The form contained certain conditions on which the information would be supplied by the association, one of which was that "The information is given in strict confidence, and must not be divulged to any person upon any pretext whatever." Upon receipt of the application, the defendant Hadwen sent to the defendant Wilmshurst a printed form asking for the fullest possible information regarding the plaintiffs and their business. Wilmshurst sent a written report to the association, for which he was paid a fee of 6*d.* by the association, and a report in substantially the same terms, which was the alleged libel, was sent by the association to Shand Kydd.

The report was as follows: "Greenlands Limited, Hereford, are house furnishers, drapers etc. The above are in a large way of business, hold very considerable stocks, and their turnover is extensive, but there are heavy debentures charged on their assets which are considered out of proportion to the break-up value of the assets. However for such credit as your figures £20/30 they are considered a fair trade risk. Created April 23, 1892 to June 29, 1908, £36,100 charged on shops etc."

The plaintiffs alleged that the report meant that it was doubtful whether the plaintiffs could be trusted for credit even to the extent of 20*l.* to 30*l.*; that they could not be trusted for

any larger sum; that they were trading beyond their capital, and were in danger of having their assets sold at a break-up price; and that under such circumstances their assets would not be sufficient to meet their liability on debentures alone, and that they were in an unsound financial condition.

The association and Hadwen delivered a joint defence denying the innuendo and pleading that the report was published on a privileged occasion and without malice in that it was written by Hadwen in answer to Shand Kydd's inquiry, in pursuance of his duty as secretary of the association to Shand Kydd, who was a member and who was contemplating the supply of goods to the plaintiffs on credit, and that the report was supplied to Shand Kydd upon the terms that it should not be divulged by him to any other person. The defendant Wilmshurst delivered a separate defence and was separately represented at the trial.

The statement of claim alleged the publication of other libels in the form of reports regarding the plaintiffs made by the association to other persons, but it was admitted that these other reports had been obtained at the instigation of the plaintiffs themselves, and the Lord Chief Justice directed the jury that the only libel in respect of which the plaintiffs were entitled to recover damages was the report to Shand Kydd.

The defendant Hadwen gave evidence at the trial. He stated that the association was formed in 1842, and that its members at the present time numbered 6300. He produced a booklet containing a prospectus of the association which stated its objects as above set out, and the advantages of a mutual society like the association in which no profits go to any individual as compared with an ordinary trade protection society. He produced a book of rules from which it appeared that the association consisted of such persons as might be elected members in the manner provided; that the business of the association was carried on under the superintendence of a committee of management, elected annually by the members, whose services were honorary, assisted by the secretary and solicitors. The annual subscription was one guinea for London, 1*l.* 5*s.* for country, and 1*l.* 10*s.* for foreign members. For the weekly gazette and the monthly journal, the latter of which

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could be bought by the public, a further subscription had to be paid. Rule 14 provided that "The rules and regulations of the association shall be binding on all the members; and any member infringing the same, or divulging any communication or information obtained from the offices except to persons of his own establishment, the same being proved to the satisfaction of the committee of management, shall be deemed ineligible to continue a member, and shall forfeit his subscription and all claim upon the services of the association." Rule 16 provided that "The property of the association and any funds which it has accumulated, or may accumulate, shall be vested in the trustees of the association, to be used and dealt with by them in furtherance of the objects of the association as the committee of management shall direct." Mr. Hadwen stated that the accumulated funds of the association amounted to about 11,000*l.*, but that no part of the accumulated funds had ever been distributed among the members. Each member was entitled each year to a book containing ten inquiry forms, and additional forms were furnished, if required, at the rate of 1*s.* each.

The jury returned a verdict for the plaintiffs for 750*l.* against Wilmshurst, who they found had been guilty of express malice, and for 1000*l.* against the association and Hadwen.

The Lord Chief Justice held that the report was not published on a privileged occasion and entered judgment against Wilmshurst for 750*l.* and against the association and Hadwen for 1000*l.*

The association and Hadwen appealed. Wilmshurst did not appeal.

Leslie Scott, K.C., and Heber Hart (F. E. Smith, K.C., with them), for the defendants the London Association for Protection of Trade and Hadwen. The appeal raises three questions—first, whether the answer of the association to the inquiry of Shand Kydd was published on a privileged occasion; secondly, whether separate judgments were rightly entered against the defendant Wilmshurst and against the defendants the association and Hadwen; and, thirdly, whether the damages awarded against

the two latter defendants were excessive. With regard to the question of privilege, there was a duty on the part of the secretary of the association to make the communication to Shand Kydd, who had an interest in receiving it. The occasion was, therefore, privileged: *Davies v. Snead* (1); *Waller v. Loch*. (2) The association is not an incorporated company or a partnership; it is a voluntary association of traders for a common purpose, namely, the ascertainment of information about persons with whom they may desire to transact business, the collection of debts, and the giving of legal advice. The giving of credit is an essential condition of trade, and it is for the common convenience and welfare of society that a communication such as was made in this case should be privileged, for a mutual organization conducted by a committee of business men is the best means of supplying to traders the information which they necessarily require in order to carry on business, and which it is practically impossible for an individual trader to obtain for himself. In the words of Brett L.J. in *Waller v. Loch* (3), "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication." Those observations are directly in point, for although in *Waller v. Loch* (2) the report, which was held to be privileged, related to the character of a person who was applying for charitable relief, it is just as much in the public interest that reports should be obtainable by, and made to, traders with regard to the financial position of persons with whom they propose to have business dealings: *Robshaw v. Smith*. (4) The question which arises in this case was recently decided in Scotland in favour of the privilege view in *Barr v. Musselburgh Merchants Association*. (5) In *David Jones v. Basma House* (6) the Court of Appeal was

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(1) 1870) L. R. 5 Q. B. 608.

(2) 7 Q. B. D. 619.

(3) 7 Q. B. D. at p. 622.

(4) (1878) 38 L. T. 423.

(5) 1912 S. C. 174.

(6) Unreported. See *The Times*, March 6, 1907, and *Shoe and Leather Record*, March 8, 1907.

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clearly of opinion in circumstances similar to those of the present case that the report was published on a privileged occasion, but it is true that the question was not there argued. [Other authorities referred to on this point were: *Fleming v. Newton* (1); *Caldicott v. Griffiths* (2); *Bayne v. Stubbs* (3); *Storey v. Challands* (4); *Stuart v. Bell* (5); *Hunt v. Great Northern Ry. Co.* (6); *Whiteley v. Adams* (7); *Alexander v. North Eastern Ry. Co.* (8); *Gwynn v. South Eastern Ry. Co.* (9); *Baker v. Carrick* (10); *Keith v. Lauder* (11); *Laws of England*, by Lord Halsbury, vol. xviii., s. 1263; *Odgers on Libel*, 5th ed., p. 252.]

Macintosh v. Dun (12) is distinguishable. The whole basis of the decision of the Privy Council that the communication in that case was not made on a privileged occasion was that the defendants carried on the business of supplying information as to the credit or characters of others for the purpose of making a profit for themselves, and that the communication was not made in the interests of society, but from motives of self-interest. That is not so here. The defendant association is not run as a business concern for the purpose of making a profit, and in fact it does not make a profit. It is true it has accumulated a reserve fund owing to its income exceeding its expenditure, but that fund is not, and by the rules cannot be, divided among the members, and its existence does not make the association a profit-making concern so as to bring it within the principle of *Macintosh v. Dun* (12): *Reg. v. Whitmarsh* (13); *Bear v. Bromley* (14); *Moore v. Rawlins* (15); *In re Jones* (16); *London Library v. Carter* (17); *In re Incorporated Council of Law Reporting* (18); *British Institute of Preventive Medicine v. Styles* (19); *Linaker v. Pilcher*. (20)

- (1) (1848) 1 H. L. C. 363.
- (2) (1853) 8 Ex. 898.
- (3) (1901) 3 F. 408.
- (4) (1837) 8 C. & P. 234.
- (5) [1891] 2 Q. B. 341.
- (6) [1891] 2 Q. B. 189.
- (7) (1863) 15 C. B. (N.S.) 392.
- (8) (1865) 6 B. & S. 340.
- (9) (1868) 18 L. T. 738.
- (10) [1894] 1 Q. B. 838.

- (11) (1906) 8 F. 356.
- (12) [1908] A. C. 390.
- (13) (1850) 15 Q. B. 600.
- (14) (1852) 18 Q. B. 271.
- (15) (1859) 6 C. B. (N.S.) 289.
- (16) [1898] 2 Ch. 83.
- (17) (1890) 6 Times L. R. 161.
- (18) (1888) 22 Q. B. D. 279.
- (19) (1895) 11 Times L. R. 432.
- (20) (1901) 70 L. J. (K.B.) 396.

Secondly, it was wrong to enter judgment against the defendant Wilmshurst for one sum and against the other defendants for another sum. The action as framed by the plaintiffs was for a joint tort against all the defendants. In fact it was not a case of a joint tort, for the tort alleged against the defendants the association and Hadwen was not the same as the tort committed by the defendant Wilmshurst. But the action having been framed by the plaintiffs as one against joint tortfeasors there was no power to enter separate judgments. Where defendants are sued jointly for a joint tort the jury are not entitled to sever the damages: *Damien v. Modern Society, Ltd.* (1); *Dawson v. M'Clelland*. (2) On the judgment as entered the plaintiffs would be at liberty to issue execution against Wilmshurst for 750*l.* and against the association and Hadwen for 1000*l.* That is clearly wrong.

Thirdly, the damages were excessive and there should in any event be a new trial on that ground.

Sir E. Clarke, K.C., and *Hugh Fraser*, for the plaintiffs. The facts of this case bring it within the principle of *Macintosh v. Dun*. (3) The association is a mere name. It is not a mutual society in any sense of the words. There are no articles of association and no deed of partnership. The so-called members are merely subscribers who in return for an annual payment are entitled to a certain number of applications for information, and they have no common interest. The operations and character of this association are in no respect different from those of Stubbs' Agency or of the defendants in *Macintosh v. Dun*. (3) It is immaterial whether the association makes a profit, but in fact there is ample material for saying that it does make a substantial profit. The authorities cited as to what constitutes a profit-making concern are tax cases and have no bearing on this point. The question is not whether it is in the public interest that correct information should be supplied to traders, but whether it is in the public interest that purveyors of incorrect information should be protected.

In *Macintosh v. Dun* (4) Lord Macnaghten said: "Then comes

(1) (1910) 27 Times L. R. 164.

(2) [1899] 2 I. R. 486.

(3) [1908] A. C. 390.

(4) [1908] A. C. at p. 400.

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the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?" The self-interest here is that of the secretary and of the solicitor of the association. It is not in the public interest that societies and agencies of this sort should be held not responsible for their mistakes which may cause irretrievable injury to individuals. The position is just the same as if Shand Kydd had addressed his inquiry to each of the members of the association individually, in which case the replies of the members, they being persons with no sort of common interest in the subject-matter of the inquiry, would clearly not be privileged: *Martin v. Strong* (1); *Hoare v. Silverlock*. (2) The statement of Brett L.J. in *Waller v. Loch* (3) is too wide. In *Elkington v. London Association for Protection of Trade* (4) Darling J. held that the reports of this association are not privileged. If the occasion was privileged the malice of Wilmshurst can in law be imputed to the other defendants: *Fitzsimons v. Duncan*. (5)

Secondly, judgment was rightly entered for the separate sums awarded by the jury. It has been the practice for many years that where several defendants are sued for a joint tort and sever their defence the jury are entitled to award different damages against the different defendants. The practice is a just and convenient one and should not be departed from. Lord Mansfield in *Hill v. Goodchild* (6), when deciding that damages cannot be severed where the count is for a joint trespass, expressly stated that the decision did not apply to cases "where the defendants plead severally."

Thirdly, in all the circumstances of the case the damages were not excessive. [They also referred to *Brown v. Allen* (7); *Clark v. Newsam* (8); *Emmens v. Pottle* (9); *O'Keeffe v. Walsh*. (10)]

(1) (1836) 5 Ad. & E. 535.

(2) (1848) 12 Q. B. 624.

(3) 7 Q. B. D. at p. 622.

(4) (1911) 28 Times L. R. 117.

(5) [1908] 2 I. R. 483.

(6) (1771) 5 Burr. 2791.

(7) (1802) 4 Esp. 157.

(8) (1847) 1 Ex. 131.

(9) (1885) 16 Q. B. D. 354.

(10) [1903] 2 I. R. 681.

Leslie Scott, K.C., in reply. The association and Hadwen cannot be made liable for the express malice of Wilmshurst. He carried on an independent business and was in no sense the agent of the association. The malice of the informant is not the malice of the person who receives and publishes the information: *Hennessy v. Wright*. (1) [He referred to *Wyatt v. Gore* (2); *Lake v. King* (3); *Capital and Counties Bank v. Henty*. (4)]

Cur. adv. vult.

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July 18. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an action brought by the plaintiffs, who are a company registered under the Companies Act, carrying on business as drapers and general furnishers, against Wilmshurst, a commercial agent and debt collector, carrying on business at Broad Street, Hereford, who is alleged by the plaintiff company to be and to have been, with reference to the subject-matter of this action, the agent of the defendants, the London Association for Protection of Trade, and Hadwen; but this is denied by the said association. The action is for libels contained in certain reports. The verdict and judgment have only been passed in respect of one of these libels, the Shand Kydd libel; but I have thought, for a reason I will give presently, that it is worth while I should read the other libels which were contained in the statement of claim; and the one I am now going to read is one of those in respect of which the verdict and judgment did not pass.

“On or about June 20, 1910, the defendants and each of them falsely and maliciously wrote and published of and concerning the plaintiffs and of and concerning them in the way of their said trade in the form of a letter addressed and sent to Messrs. J. W. Hawker & Sons the following words: ‘L. A. P. T. Head Office, 16, Berners Street, London, W. 20th June, 1910. To Messrs. J. W. Hawker & Sons. J. H. Hadwen, Secretary. Greenlands Ltd.,’ (meaning thereby the plaintiffs) ‘Hightown, Hereford. £35/45. The above’ (meaning thereby the plaintiffs) ‘are in a large way of business, hold very considerable stocks, and their turnover is extensive, but there are heavy debentures charged on

(1) (1888) 24 Q. B. D. 445.

(3) (1668) 1 Saund. 131 b.

(2) (1816) Holt, 299, at p. 306, n.

(4) (1882) 7 App. Cas. 741.

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1913 informants can recommend with confidence.'” “(5.) On or about
GREEN- June 23, 1910, the defendants and each of them falsely and
LANDS, maliciously wrote and published of and concerning the plaintiffs
LIMITED and of and concerning them in the way of their said trade in the
v. form of a letter addressed and sent to Messrs. Whitmore's Timber
WILMSHURST Company, Limited, the following words: 'L. A. P. T. Head Office,
AND THE 16, Berners Street, London, W. To Messrs. Whitmore's Timber
LONDON Co. Ltd. J. H. Hadwen, Secretary. Greenlands Ltd.,' (meaning
ASSOCIATION thereby the plaintiffs) 'Decorators, Hereford. £50/60. The
FOR above' (meaning thereby the plaintiffs) 'are in a large way of
PROTECTION business, hold very considerable stocks, and their turnover is
OF TRADE. extensive, but there are heavy debentures charged on their assets
Vaughan which are considered out of proportion to the break-up value of the
Williams L.J. assets. Informants hear rumours as to their' (meaning thereby
the plaintiffs) 'financial position and at the present time do not
care to speak for credit.'” “(6.) On or about July 13, 1910, at
the offices of the defendant Wilmshurst, Broad Street, Hereford,
the defendant Wilmshurst, as agent for and on behalf of the
defendants the London Association for Protection of Trade, and
as agent for and on behalf of the defendant Hadwen, and also for
himself individually, falsely and maliciously spoke and published
of and concerning the plaintiffs and of and concerning them in
the way of their said trade to one Alfred John Wilkins the following
words: 'Rumours are about in the town' (meaning Hereford) 'that
Greenlands Limited' (meaning the plaintiffs) 'are wanting credit
. . . . They' (meaning the plaintiffs) 'do not take up their full
trade discount. It looks rather bad and seems risky to supply
Greenlands' (meaning the plaintiffs) 'with goods to the value of
£50 or £60 on credit.'” “(7.) On or about August 18, 1910, the
defendant Wilmshurst, as agent for and on behalf of the defendants
the London Association for Protection of Trade, and as agent
for and on behalf of the defendant Hadwen, and also for himself
individually, wrote and published of and concerning the plaintiffs
and of and concerning the plaintiffs in the way of their said
trade in the form of a letter addressed and sent to Messrs. Whit-
more's Timber Co., Ltd., the following words: 'Wilmshurst &

Co., Accountants, Auditors and Fire Loss Assessors. Hereford, 18th August, 1910. Messrs. Whitmore's Timber Co., Bury St. Edmunds. Replying to your memo of 16th instant the persons referred to ' (meaning thereby the plaintiffs) . . . ' appear to have extended beyond their means and in view of the facts mentioned to your Mr. Wilkins ' (meaning the statements set out in the preceding paragraph) ' together with the fact that we have had so many inquiries of the same nature we do not advise you to have any credit transactions with the parties ' (meaning thereby the plaintiffs) ' at present. ' "

The Lord Chief Justice, after referring to the libels which I have set forth other than the libel communicated in answer to the inquiries of Shand Kydd as the result of traps laid by the plaintiffs to probe the source of the rumours and see if the defendants would repeat the libels, told the jury that the libel in respect of which the plaintiffs were entitled to recover damages was the Shand Kydd libel. I have set out the other libels, although not the libels in respect of which the verdict and judgment were given, because they illustrate the character and scope of the business carried on by this trade protection society, and the facility with which information could be obtained on a payment of a small sum called a membership fee.

The jury found a verdict for the plaintiffs against Wilmshurst for 750*l.*, and against the association and Hadwen for 1000*l.*, and the Lord Chief Justice adjourned the action for further consideration; and, after hearing counsel, directed that judgment should be entered for the plaintiffs against Wilmshurst for 750*l.* with costs, and against the association and Hadwen for 1000*l.* and costs. This is the judgment appealed against. It is convenient to state here that the London Association for Protection of Trade is not a company registered under the Companies Act, or a legal entity of any sort.

There are several points raised in the notice of appeal by the association and Hadwen. There is no appeal by Wilmshurst. The principal grounds of appeal are: "(1.) That it was proved by uncontradicted evidence that the defendant association was an association of traders formed and existing exclusively for their mutual protection and assistance, and maintaining offices and

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officers exclusively for their common use and service. (2.) That there was no finding by the jury and no evidence that the defendant association traded for or made profit or that the making of profit was within its scope or objects. (3.) That the words in respect of the publication of which the said verdict and judgment were given were published by these defendants on a privileged occasion; and there was no finding by the jury and no evidence of malice on the part either of the defendant association or of the defendant Hadwen. (4.) That the finding of the jury has not been properly entered. (5.) That upon the finding of the jury upon the questions submitted to them judgment ought to have been entered for these defendants. (6.) That the learned Lord Chief Justice was wrong in directing judgment to be entered for different amounts against these defendants and the defendant Wilmshurst respectively. (7.) That the verdict of the jury shewed that they had not understood the nature of the issue between the plaintiffs and these defendants, and that they had returned their verdict under a misapprehension as to the gist of the cause of action on which the plaintiffs sued these defendants herein. (8.) That the damages awarded against these defendants were unreasonable and excessive. (9.) That damages were wrongly found by the jury against these defendants and the defendant Wilmshurst separately."

I propose at once to deal with the question of privilege. Mr. Odgers, in his well-known book on Libel and Slander, groups qualified privilege under five heads; but it is only heads (1.) and (2.) which I propose to deal with. "(1.) Where it is the duty of the defendant to make a communication to another person who has an interest in the subject-matter of the communication, or some duty in connection with it. (2.) Where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest, or some duty in connection with the matter." He divides head (1.) into two parts, (A) Statements made in answer to inquiry, (B) Statements not in answer to previous inquiry. The libel here complained of, whether regarded as written and published by Wilmshurst or regarded as written and published by the association and Hadwen, or both by Wilmshurst and the

other defendants, seems to have been written in answer to respective inquiries made to the association, the one with which I am dealing being the inquiry of Shand Kydd to the group of persons calling themselves the London Association for Protection of Trade; the other being the inquiry, or instruction to inquire, made of or to Wilmshurst by the association. Head (2.), that is to say, where the defendant has an interest in the subject-matter of the communication, and the person to whom the communication is made has a corresponding interest or some duty in connection with the matter, is thus applied by Lord Esher in *Hunt v. Great Northern Railway* (1): "The occasion had arisen if the communication was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist, the occasion is a privileged one, and the question as to whether it was or was not misused is an entirely different one."

As I understand from the statements of counsel arguing before us, in those cases which have been called the "trick" cases, that is, the cases other than the application of Kydd, who was a member of the association, the instruction to make inquiries as to the financial position of the plaintiffs was accepted by Hadwen on one of the association's forms, without going through the formality of submitting his name to the committee of management, on payment of 1*l.* 1*s.*, one year's subscription. The "trick" cases were really applications made to the association for the mere purpose of making evidence against the association as to the source of the libel.

It is convenient here to state the method of business adopted by the association. In form the London Association for Protection of Trade is merely an association of individuals who call themselves members, and who are elected, or rather, in fact, nominated by the secretary. The election is by the secretary submitting to the committee of management the names of candidates for enrolment of members for their approval or disapproval at an ordinary meeting of the committee of management, and

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each member has to pay an annual subscription. One of the objects of the association is the making of private inquiries as to the actions, respectability, and trustworthiness of individuals and firms. Another is the detection and exposure of swindlers.

I doubt very much whether the publication of information obtained from a person who is paid for the information he supplies is information given on a privileged occasion. The authority which was relied on before us as specifically dealing with this point was *Waller v. Loch*. (1) Sir George Jessel, in delivering judgment, says: "According to *Harrison v. Bush* (2) a communication which a person makes bona fide in discharge of a moral or social duty of imperfect obligation, is privileged," and later, on the same page, says: "It is not necessary in all cases that the information should be given in answer to an inquiry. In *Davies v. Snead* (3) Blackburn J. says that 'Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bona fide and without malice does tell them, it is a privileged communication.' Now, if the secretary believed that the lady to whom he gave the information in this case was making the inquiry in order to learn whether the plaintiff was deserving of assistance, with a view to relieving her or inducing other persons to relieve her, then he was discharging a moral or social duty in answering the inquiry, and was entitled to answer it." Brett L.J. rather widens the scope of the definition of Sir George Jessel M.R. founded on the dictum of Blackburn J. in *Davies v. Snead* (3), for he says (4), after referring to that dictum, "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has the means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication." Cotton L.J. says (4): "Different definitions have been given of what constitutes a privileged communication, and though Brett L.J. objects to the use of the word 'duty,' I am disposed to say that it is a communication made in discharge of a duty legal, moral, or social

(1) 7 Q. B. D. at p. 621.

(3) L. R. 5 Q. B. at p. 611.

(2) (1855) 5 E. & B. 344.

(4) 7 Q. B. D. at p. 622.

—a legal duty, or a duty of imperfect obligation. A duty of imperfect obligation attaches on every one to do what is for the good of society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it, when asked by persons who wish to know whether the applicants are deserving objects.” To my mind it is quite clear that, whether one takes the judgment of Sir George Jessel M.R., or that of Brett L.J., or that of Cotton L.J., the duty or right, call it how you may, to make the communication is a duty to society, to do what is for the good of society.

We have to deal in this case with the communication made by the association, a group of individuals, through their secretary Hadwen to, I will assume, a member of the group, of information obtained for a fee from Wilmshurst, a person who was neither servant nor agent of the group or of any member of it or of any benevolent society. I doubt if the group or Hadwen were discharging a moral or social duty in obtaining and giving information which was got for the association or a member of it at a price for the service by Wilmshurst. I doubt also if the case was one in which, to take the definition of Brett L.J., a person who was thinking of dealing with another in a matter of business asked a question from some one who had means of knowledge. The question was asked of the association through its secretary Hadwen, who had no present knowledge, but could, by payment, obtain information from a person willing on his part to make inquiries, such person being in no sense a person owing a duty to the person making the inquiry. There must, I think, be some limit to the proposition that the publication of information thus obtained by payment to a stranger is a publication on a privileged occasion, and that the publication is privileged unless the plaintiff proves express malice of the defendant. It clearly cannot be said, in my opinion, that the occasion would be privileged if the defendant obtained the information by the employment of a paid detective who, independently of his duty arising from his employment as a detective, would owe no duty to the defendant such as that which was owed by the officers of the Charity Organisation Society to the society, or by servants to their masters, whether in private service or in

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public service, e.g., the servants of a railway company. Taking the judgment of Cotton L.J. in *Waller v. Loch* (1), I think it clear that his judgment does not cover the present case. If it be the law, as appears from *Macintosh v. Dun* (2), that information by persons who supply information and make a profit thereby cannot set up privilege as a defence, it seems to me to follow that if a person buys information he cannot rely upon the information so bought as information given on a privileged occasion.

I think that I have said enough to negative the occasion in this case being a privileged occasion; but I prefer to rest my judgment, at all events alternatively, on the case of *Macintosh v. Dun*. (2) The decision in that case is thus summarized by Mr. Odgers in the last (5th) edition of his work on Libel and Slander at p. 262: "The defendants carried on, under the name of 'The Mercantile Agency,' the business of obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere, and of communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiries on their part. The defendants in reply to such an inquiry supplied information to a customer defamatory of the plaintiff. It was held by the Judicial Committee of the Privy Council, that there was no privilege as such information was supplied, not in the general interests of society or from a sense of duty, but from motives of self-interest, and as part of the defendants' business, which consisted in trading for profit in the characters of other persons." I have quoted that from Mr. Odgers' book because, having read the case of *Macintosh v. Dun* (2), I think it correctly states what the decision was. Then Mr. Odgers goes on and says something which one, of course, has to take into consideration, although it in no way binds us. "The law is otherwise in America. It appears to be generally accepted there that when a merchant inquires from Messrs. Stubbs or Perry, or any other mercantile agency, as to the solvency of a person with whom he is about to deal, the answer to such inquiry is privileged. But where a mercantile agency or trade protection society issues a

(1) 7 Q. B. D. 619.

(2) [1908] A. C. 390.

weekly circular or notification sheet and sends it to all its subscribers, some of whom will be interested in one item, others in another item, but none in all the items of information contained in it, the judges of the Court of Errors and Appeals in New Jersey were divided in opinion, the majority (nine to five) holding that such a communication was not privileged." The former editions contained this passage: "When a merchant inquires from Messrs. Stubbs or Perry, or any other mercantile agency, as to the solvency of a person with whom he is about to deal, the answer to such inquiry is privileged. But where a mercantile agency or trade protection society issues a weekly circular or notification sheet and sends it to all its subscribers, some of whom will be interested in one item, others in another item, but none in all the items of information contained in it, the judges of the Court of Errors and Appeals in New Jersey were divided in opinion; the majority (nine to five) holding that such a communication was not privileged." And the law in the United States is thus stated by Townshend in his book on Slander and Libel, 4th ed. at p. 417: "*Getting v. Foss*. (1) Where the defendant kept a mercantile agency, whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to subscribers to his agency, it was held that a communication made in good faith to a subscriber to such agency was privileged. 'The business in which the defendant was engaged is sanctioned by the usages of commercial communities.' (*Ormsby v. Douglass* (2).) . . . The circular of a mercantile agency, issued to their subscribers generally, is not privileged, although a publication by such an agency to persons having dealings with plaintiff would be privileged. (*Commonwealth v. Stacey* (3); *Sunderlin v. Bradstreet* (4).)"

The statements of the law to which I have just referred, it is urged, are inconsistent with the law as stated in the judgment of Lord Macnaghten in *Macintosh v. Dun*. (5) The decision of the Privy Council does not bind us, but should be studied with

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(1) (1827) 3 C. & P. 160.

(3) 1 Leg. Gaz. Rep. (Pa.) 114.

(2) (1867) 37 N. Y. 477.

(4) (1871) 46 N. Y. 188.

(5) [1908] A. C. 390.

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care, and prima facie should be followed, especially having regard to the constitution of the Judicial Committee that heard the case. I think that the effect of the decision in *Macintosh v. Dun* (1) is accurately stated in the head-note in the *Law Reports*: "Held, that the occasion was privileged if the communication injurious to the plaintiffs' character was made in the general interest of society and from sense of duty; not so, if it was made from motives of self-interest by those who for the convenience of a class trade for profit in the characters of other persons, and who offer for sale information which, however cautiously and discreetly sought, may have been improperly obtained." Now, looking at the judgment itself of Lord Macnaghten, he says (2): "The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion. The plaintiffs are wholesale and retail ironmongers in Sydney. The defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society 'in almost all parts of the civilized world,' under the name of 'The Mercantile Agency.' That business, as the acting manager explained, 'consists in obtaining information with reference to the commercial standing and position of persons' in the State of New South Wales 'and elsewhere, and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part.' He stated further that all requests for information directed to the agency by their subscribers are in the following form:—'Subscriber's ticket, The Mercantile Agency, R. G. Dun & Co. Established 1841. Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have, respecting the standing, responsibility, etc. of—Name, Business, Town, Street Address, State. Subscribers to sign the above themselves. . . . Subscriber, per . . . Sydney, 190 , No. .'" I do not see that the constitution of the Mercantile Agency differs in substance from the London Association for Protection of Trade. In substance there is, in my opinion, no difference between the

(1) [1908] A. C. 390.

(2) [1908] A. C. at p. 397.

subscriber to the former and the member of the latter. Lord Macnaghten, after citing a passage from the judgment of Parke B. in *Toogood v. Spyring* (1), says (2): "That passage, which, as Lindley L.J. observes (3), is frequently cited, and 'always with approval,' not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is 'the common convenience and welfare of society,' not the convenience of individuals or the convenience of a class, but, to use the words of Erle C.J. in *Whiteley v. Adams* (4), 'the general interests of society.'"

Lord Macnaghten then deals with the question whether it makes any difference that the information is volunteered or brought out in answer to an inquiry, and concludes his observations by saying (5): "It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance. If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit." Lord Macnaghten, at this point in his judgment, is dealing only with the distinction between information volunteered and that brought out in answer to an inquiry, but the words that I have just cited as to self-interest and the hope and expectation of making a profit must be borne in mind when the judgment comes to deal with what Lord Macnaghten calls the real question. He says (5): "Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of

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(1) (1834) 1 C. M. & R. 181, at p. 193.

(2) [1908] A. C. at p. 399.

(3) [1891] 2 Q. B. at p. 346.

(4) 15 C. B. (N.S.) 392, at p. 418.

(5) [1908] A. C. at p. 400.

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other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed from disloyal employees. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law."

It occurs to me that the obtaining of information from Wilmshurst, even though the fee was small, falls within the principle of Lord Macnaghten's observations. I think, however, that it should not be forgotten that trading for self-interest is the keynote that runs through the whole of the passage. The members of the association, although they did, in my opinion, sell information at a price and make a profit, yet were not traders in the ordinary sense of the word. They were all of them men of a commercial class accustomed to give credit, who joined together to get the characters, presumably of their would-be customers, and they conducted the business of getting these characters in such a manner that the payments they received from the subscribers, whom they called members, were such as to leave them yearly with a considerable profit balance, which from time to time they invested. I do not think that the communications made as to the characters and pecuniary position of would-be customers were made in legitimate self-defence, or from a bona fide sense of duty. The interests considered were the interests of a class, and the information which they gave in return for the members' subscription was, in my opinion, not obtained cautiously and discreetly when they got it from Wilmshurst, who was not a servant or a confidential agent.

I have thought it essential in my judgment in this case to set forth the passages which I have quoted, lest I should have overlooked words in the judgment of Lord Macnaghten which might be relied on as distinguishing the present case from *Macintosh v. Dun* (1), but the salient principle of Lord Macnaghten's judgment is to be looked for in two passages which I shall now quote. On p. 401, Lord Macnaghten quotes what he calls "the striking language" of Knight Bruce V.-C. in *Pearse v. Pearse* (2): "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable or important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much." Having quoted this passage, Lord Macnaghten thus states the conclusion arrived at by the Privy Council: "It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his 'standing,' his 'responsibility,' and whatever else may be comprehended under the expression 'et cetera,' yet, even so, accuracy of information may be bought too dearly—at least for the good of society in general. It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle." It seems to me that the case we have to deal with falls clearly within the principle laid down by Lord Macnaghten. The members of this group of individuals

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(1) [1908] A. C. 390.

(2) (1846) 1 De G. & Sm. 12, at p. 28.

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who choose to call themselves the "London Association for Protection of Trade" unite as members of a commercial class, and, in the course of the business carried on by them individually, try to find out "all the secrets of their neighbour's position, his standing, his responsibility, and whatever else may be comprehended under the expression 'et cetera,'" and provide for the expense of obtaining this information by fees paid by those who choose to join the group, which fees result in a profit balance after paying all expenses, which balance from time to time is invested. This invested balance in my judgment constitutes "profit," in the sense in which Lord Macnaghten uses the word in his judgment—profit earned by the group as collectors of information about other people, which information is transferred to the individual subscriber or member, in consideration of the fees he pays, information which in the present case was obtained from a stranger at a price.

Taking the view which I have expressed, it would follow *prima facie* that this appeal should be dismissed, and the judgment of the Lord Chief Justice affirmed; but, for reasons which I will shortly state, I think that the judgments in this case cannot stand, but that they must be set aside and a new trial had. The Lord Chief Justice, the jury having found a verdict for the plaintiffs against Wilmshurst for 750*l.* and a verdict for the plaintiffs against the London Association for Protection of Trade and Hadwen for 1000*l.*, adjourned the case for further consideration, and, after hearing counsel, directed that judgment should be entered for the plaintiffs against Wilmshurst for 750*l.* with costs to be taxed, and against the other defendants for 1000*l.* with costs to be taxed. Wilmshurst, as I have already said, has not appealed. I have taken it for granted, though I have not actually seen the judgments, that the judgments are separate judgments separately drawn up. It seems to me that it is a joint action, but the defendants severed in their defences. In my judgment, in such a case, verdicts and judgments for different amounts against different defendants are wrong. The balance of authorities cited on p. 57 of Bullen and Leake's *Precedents*, 6th ed., by Cyril Dodd and T. Willes Chitty, plainly supports that: "The view that where several have so conducted

themselves as to be jointly liable for a wrong each must be held responsible for the whole injury sustained by the plaintiff is held in other cases to be correct. . . . It is suggested that the better opinion is, that where the circumstances are such that damages for the wrong done may be given, beyond the pecuniary loss suffered by the plaintiff, then if there are circumstances of aggravation as against some one or more of the defendants, and not as against others, there may be separate assessments of damage followed by separate judgments, . . . and that if, as would usually be the case, the plaintiff consents to this course, it is not open to objection, and further that where the wrong complained of is caused by a series of acts, it may be that there may be separate assessments when the parts taken by the various defendants have so varied as to make a distinction in the damages appear just."

I do not think that these verdicts and judgments can stand, but, be that as it may, it is plain that the damages are excessive, and this alone would seem to be a ground for a new trial. There must be one judgment and one assessment of damages. It has been pointed out that there was not in fact a joint libel in this case; but the Lord Chief Justice in his summing up seems to have treated the libel which I have called the Shand Kydd libel as a joint tort; and there seems to have sprung up recently a practice in some cases to allow the jury to give different damages against different defendants sued in an action as joint tortfeasors. This practice, as I have pointed out, is unjustifiable; but having regard to the conclusions we have arrived at in this case, it does not seem necessary to deal with the question whether in fact there was any joint tort.

HAMILTON L.J. read the following judgment:—This action was clearly brought as upon a joint tort, namely, a publication to Mr. Kydd and others by the defendant association to which Wilms-hurst was an actual party. Judgments, however, have been entered separately against Wilms-hurst and the other defendants, and Wilms-hurst does not appeal. We are only concerned with the judgments against the appellants. As to the form of the

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action, and the parties to it, no point was made. It is equally clear upon the evidence that there was no joint tort at all. Wilmshurst may have expected that the association would make use of his libellous letter in replying to some customer's inquiry, but he was not called, and his information might simply have been pigeon-holed, or modified in substance, as it was in language. He may not have cared what use was made of it, so long as he got his sixpence for it. He libelled the plaintiffs, and so did the association, but the libels were separate libels, published to separate persons on separate occasions, in slightly different terms and in quite different circumstances.

It is also equally clear that the verdict on this joint claim was found separately and that judgment was entered separately as against Wilmshurst on the one hand, and the association and its secretary on the other. The rule is well settled that "Where there is a single cause of action, arising from a joint tort, and damages is the only relief claimed against the tortfeasors, and the action is fought out to the close on that basis, the jury have no power to sever the damages": per Kenny J. in *O'Keeffe v. Walsh*. (1) "When, in trespass against divers defendants, they plead not guilty, or several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants, because all is one trespass, and made joint by the plaintiff, by his writ and declaration; and although one of them is more malicious, and de facto doth more and greater wrong than the others, yet, all coming to do one unlawful act, and of one party, the act of one is the act of all of the same party being present": *Sir John Heydon's Case*. (2) "Against joint trespassers there can be but one satisfaction, and therefore if they be sued in one action, though they may sever in pleas and issues, yet one jury shall assess damages for all": *Cooke v. Jennor*. (3) These passages and the practice of fully a century, dispose of the suggestion argued before us on the strength of a passage in *Hill v. Goodchild* (4), and revived as recently as *Damiens v. Modern Society* (5), that the point turns on the

(1) [1903] 2 I. R. at p. 726.

(3) (1603) Hobart, 66.

(2) (1612) 11 Rep. 5b.

(4) 5 Burr. 2791.

(5) 27 Times L. R. 164.

conduct of the defendants; if they sever their defence several assessments of damages may be made: otherwise not. The unity of the verdict and of the judgment when the tort is joint is founded on and must stand with the legal theory of the liability of joint tortfeasors. "It is the necessary and logical result of the legal principles applicable to this kind of action. What the plaintiff is entitled to receive is a sum representing the damage that he has suffered from a single wrong inflicted by all. One defendant has no right to say that his contribution to the injury was smaller than that of the others": Holmes L.J. in *Dawson v. M'Clelland*. (1) See also *Brown v. Wootton* (2); *Mitchell v. Milbank* (3); *Eliot v. Allen*. (4) Whatever may be the rule in a case of conspiracy where several defendants join it at different dates and do several acts in furtherance of it, or in the case of continuing torts like nuisance or letting down the surface of land (*O'Keeffe v. Walsh* (5)), it is clear that, in the case of an action for a single tort against tortfeasors, neither the Judicature Acts nor Order xvi. have altered the law, though text-books of authority seem to have varied in their view of the matter. Chitty's Archbold, 1885, p. 666, is to the above effect; Bullen and Leake, 6th ed., p. 57, suggests a different opinion. Probably the rule has often been disregarded in practice, sometimes by consent, often because it was of no practical importance, but this cannot affect the rule or its obligation. The point has been raised and must be decided. In my opinion the law has been settled too long for this Court to disturb it. As the action was framed, the verdict was wrongly found.

It is not, however, at all clear whether the case was ultimately left to the jury as a case of joint tort or of several torts. The language used was so far doubtful, that I do not think the appellants are precluded from raising the point now by reason of their not having raised it at the end of the summing up and before the verdict was given. At any rate there was no lying by within the decisions

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(1) [1899] 2 I. R. 486, at p. 501.

(3) (1795) 6 T. R. 199.

(2) (1605) Cro. Jac. 73.

(4) (1845) 1 C. B. 18.

(5) [1903] 2 I. R. 681.

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 1913 proved was one of separate torts, and as Wilmshurst was
 GREEN- separately represented, the learned judge may have intended to
 LANDS, leave the case to the jury as one of separate torts and to treat
 LIMITED the pleadings as amended accordingly, so as to make the verdict
 v. and judgment right in form. It is not necessary to decide this.
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 AND THE the necessary formal amendments of the pleadings which the
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In my opinion on another ground the verdict against the appellants cannot stand. The damages are excessive. For the purposes of damages, the learned judge left to the jury only the libel published to Mr. Kydd. They must be taken to have acted on this direction. Some doubt of its correctness was afterwards expressed by the learned judge, but it was not communicated to the jury and did not affect their finding. The libel was published to Mr. Kydd on the strictest terms of confidence. If its contents leaked out, the appellants are not responsible for that. Its effect on Mr. Kydd we do not know. It may have had no effect on him at all. He was not called. It is said that an imputation on a trader's credit is grave, and I agree; that the jury may express their sympathy with the plaintiff at the defendant's expense and mark their sense of the defendant's misconduct in the same way. They are allowed to do so within reason, though there is not much reason in it. It is said that the defendants' counsel set the jury against him by the impetuosity of his attack on the plaintiffs and that the jury could inflame the damages for that. Still, in my opinion by no formula or manipulation can 1000*l.* be got at. For any damage really done, 100*l.* was quite enough: double it for the sympathy: double it again for the jury's sense of the defendants' conduct, and again for their sense of Mr. F. E. Smith's. The product is only 800*l.* I am aware that "In libel the assessment of damages does not depend on any definite legal rule": per Lord Watson in *Bray v. Ford*. (3) There must be some reasonable relation

(1) [1896] A. C. 44.

(2) (1909) 100 L. T. 761.

(3) [1896] A. C. at p. 50.

between the wrong done and the solatium applied. The verdict is excessive and cannot stand.

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This conclusion leads only to a new trial. The appellants claim judgment, saying that there was no evidence of express malice, which is true, and that the occasion was privileged, which is the really important and novel question in the case. In *Macintosh v. Dun* (1), a case in which all the authorities pressed upon us were fully discussed, Lord Macnaghten in delivering the judgment of the Privy Council said that this question was bare of direct English authority, and the diligence of counsel has only succeeded in adding to the cases then cited the case of *David Jones v. Basma House*, reported in the "*Shoe and Leather Record*," the representative organ of the shoe and leather trade," of March 8, 1907. Our admission of a reference to this series of reports must not be taken as a precedent. The case itself amounts to nothing. The question discussed was express malice. In circumstances no doubt closely similar to those of the present case the parties had agreed that the occasion was privileged. Each member of the Court mentions this fact, two without comment, but the Master of the Rolls said: "It was formally admitted in the Court below, and could not be disputed, that the alleged libel in question was on a privileged occasion, and that the plaintiff cannot succeed unless he can establish express malice." This is all. The matters involved in the present case do not seem to have been discussed, nor were any of the decisions bearing on it brought to the attention of the Court of Appeal.

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Accordingly it becomes necessary first to consider what is the test of a privileged communication in circumstances of this kind and then to determine whether that test can be applied to them so as to distinguish *Macintosh v. Dun* (1) and arrive at a result different from the result of that case. "Occasions of qualified privilege," says Dr. Odgers in his well-known work on Libel (5th ed. at p. 249), "may be grouped under five heads: (1.) Where it is the duty of the defendant to make a communication to another person, who has an interest in the subject-matter of the communication or some duty in connection with it. (2.) Where

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the defendant has an interest in the subject-matter of the communication and the person to whom the communication is made has a corresponding interest or some duty in connection with the matter." The other members of the group of five are for the present purposes immaterial. The most authoritative tests hitherto suggested for the above-mentioned group, (1.) and (2.), are those given in (1.) *Toogood v. Spyring* (1), (2.) *Harrison v. Bush* (2), (3.) *Davis v. Snead* (3), and (4.) *Stuart v. Bell*. (4) In the first case it is said by Parke B. that a statement is privileged if "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." In the second case Lord Campbell C.J. says that the privilege applies to communications "upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, . . . if made to a person having a corresponding interest and duty." Duty here includes moral and social duties of imperfect obligation. Blackburn J. lays it down in the third case that the privilege arises "where a person is so situated that it becomes right in the interest of society that he should tell to a third person" certain facts. In the fourth case Lindley L.J. says that privilege attaches to statements made in the legitimate defence of a person's own interest, or plainly under a sense of duty, such as would be "recognized by English people of ordinary intelligence and moral principle." The reasons given for these propositions are that such communications are protected for the common convenience and welfare of society, but this does not mean the convenience of individuals or of some class of individuals, but the advantage of society as a whole. No doubt *salus populi suprema lex*, but this does not extend to the sacrifice of one man's commercial existence in order that a group of tradesmen may sell goods on credit without too much risk of ultimately losing their money. In the present case we may lay aside the test of the defendants' "interest being concerned" in aspersing the plaintiffs, for they had none; nor was it in the interests of society that they should make this

(1) 1 C. M. & R. at p. 193.

(2) 5 E. & B. 344, at p. 348.

(3) L. R. 5 Q. B. at p. 611.

(4) [1891] 2 Q. B. at p. 350.

statement. Even in a nation of shopkeepers their interest cannot be put higher than that they should get value for their money. As to the "sense of duty such as would be recognized by English people of ordinary intelligence and moral principle" (which by the by is a question for the Court and not for a jury) we have it that in *Macintosh v. Dun* (1) the members of the Privy Council then sitting did not think there was any duty incumbent upon Dun, legal, social, or moral, which they at any rate could recognize as people of ordinary intelligence and moral principle. To my mind it is in name only that the decision of the Privy Council in *Macintosh v. Dun* (1) is not an authority binding upon us. The question is rather, can it be distinguished on the facts than can it be questioned in principle? It is said that in that case the communication was volunteered. I think the Privy Council attached but little importance to this (see the observations on p. 399, line 19); but for what the point may be worth, I think the communication was equally volunteered here. Mr. Kydd as a member sent in his inquiry to the association just as Holdsworth, Macpherson & Co. did as subscribers to Dun. The defendant association here invites people to join it by announcements of the services it can render very much as Dun invited subscribers by advertising his business. Whether the defendant association advertises itself, or sends out its booklets indiscriminately, is not proved. Nothing in the booklet which was put in evidence, or in the oral evidence itself, discountenances such a supposition, and the booklet contains clear internal evidence that it addresses itself to persons who are not yet its members but are still free to give their patronage to firms in the position of Dun, and it endeavours to compete with such firms and to persuade readers to bring their inquiries to its establishment. Though the fact that a communication is volunteered is material on the question of malice—the defendant a fussy busybody acting "ultroneously," or a person discharging a genuine social duty?—it is not conversely true that the issue of privilege or no privilege can generally turn on this circumstance. Privilege must depend on the relations of the parties, on the duty thereout arising, and on

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the occasion which is used or abused, not on the mere accident, who spoke first. When this is critical it is on account of the nature of the duty the discharge of which may or may not be consistent with volunteering the statement. There is no general rule that statements which would be privileged if made in answer to an inquiry cease to be so when the informant has not waited to be asked. Again, in *Macintosh v. Dun* (1), Dun it is said made a profit by his enterprise, though to be sure if he had only tried to do so and had actually made a loss it would not have mattered. But so does the association here. The only difference is that the association does not divide, but accumulates, its profits. Some day when the accumulations constitute a reserve fund sufficient to indemnify its officers pursuant to the rules, even in the cautious view of a salaried secretary and an unremunerated committee, there is no reason why further profits should not be distributed among the members of the year. If this is not so, and somehow or other the members never can participate in the profits, then the association is not truly speaking a mutual association. If it is so, the business is carried on by the association inter alia for profit. I am aware that it does not schedule the making of profit among its objects, but there is no reason why it should not do so. The statement of its objects is not exhaustive. The booklet is not a memorandum of association. The object is to commend the business carried on to proposing or possible members. I do not mean that there is anything to be said against the earning and the accumulation of profit, but the fact prevents the case from being distinguishable from *Dun's Case* (1) on the point. On the evidence I think it clear that the association carries on business just as truly as Dun did, and that its business consists in selling to its members for reward information which it purveys about the credit of third parties. I say nothing of its position when the association is exercising its function of exposing fraud and warning its members against rogues. We are only concerned with the business which it carries on in the course of which the plaintiffs were libelled. A shop is none the less a shop though it is a co-operative store.

It is on this alleged mutuality that the association chiefly relies

(1) [1908] A. C. 390.

for the purpose of distinguishing *Macintosh v. Dun*. (1) I think it comes to very little. Possibly upon a new trial the defendants may adduce ampler evidence, and obtain a specific finding from the jury on these points. I do not in the least question the evidence given, or seek to add to it, or reflect on those who gave it; but I can only take their evidence as it stands as being a full description of the association and its business. The defendants had to prove their case of privilege. The membership is unlimited in numbers, and in qualifications. Any one can join on payment of a modest fee. His inquiries are dealt with at once, without his waiting to be approved as a member by the committee. (See the secretary's reply to Whitmore's Timber Company dated June 15, 1910.) Theoretically he may be rejected by the committee, just as a cash customer may theoretically be turned away by a shop-keeper; but there is no suggestion that it is ever done. The association publishes a journal, the *Trades Protection Journal*, which is on sale to the public; and it makes a substantial profit on it. I do not suppose that the goodwill of this paper is vested in the fluctuating body of members. They are scattered far and wide; they have no common interest among themselves, so far as concerns inquiries about the credit of proposing customers. Each has a similar interest to that of the others, namely, to know whom to trust; but it is his own individual interest with regard to his own customers, and not a common one. Between the association and the member there is no common interest. Between them the relation is that of purveyor and consumer. There is no interest to which the adjective "correlative" could be applied, as it is by Collins M.R. in *Boxsius v. Goblet Frères* (2); or the adjective "corresponding" as used in *Whiteley v. Adams* (3), and by Fitzgerald B. in *Bell v. Parke* (4), and by Lord Esher M.R. in *Hunt v. Great Northern Railway*. (5) The association's interest and duty is to earn its 25s. and get further business by giving satisfaction. Dun's interest and duty were precisely the same. The member's interest is to be told what he wants to know. His only duty is the self-regarding one of looking after

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(1) [1908] A. C. 390.

(2) [1894] 1 Q. B. 842.

(3) 15 C. B. (N.S.) 392.

(4) (1860) 11 I. C. L. R. 413, at
p. 422.

(5) [1891] 2 Q. B. at p. 191.

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himself. The association cares nothing about the person inquired about. It keeps registers and organizes a system of inquiry, solely to supply answers to correspondents, and not for its own consumption. The member knows and cares nothing about other members, beyond believing that in the long run sound trade is best for everybody. If the committee has a general policy of its own to follow, we have no evidence what it is or what is done. I do not mean to say that if a person is under a duty to make a statement, such that the making of it becomes privileged, the fact that he is paid for discharging that duty necessarily destroys, or even militates against, the privilege; but here the duty to speak arises when, and only when, the subscriber has paid; and it should be observed that the decision of the Privy Council was adverse to Dun, in spite of the jury's finding that in making the statement complained of he was acting under a sense of duty to the subscribers. In brief the only sense in which this association is a mutual one and Dun's business was not is that it can offer to do business cheaper than people like Dun can. This is the point made by the association itself in its booklet; and I am sure it knows best. "A private information agency must make its profit, and must charge enough to pay one. A mutual one pays its officers by salary and does not pay its committee at all"; ergo it can charge less. Such is the argument; I doubt if it is financially sound, but the real point is that in both cases a business is being carried on, and carried on substantially in the same way. The mutual principle in this case is not a distinction in substance. The interest, correlative but not common, the duty, whether of perfect or imperfect obligation, is the same between Mr. Hadwen and his association's members as between Messrs. Dun and their subscribers. It is not to be overlooked that the whole government of the association, including the election of the committee, and the appointment of the secretary and other officers, rests with the members in general meeting assembled. For the present purpose it is not necessary to consider how far their position is affected by the fact that they are neither incorporated nor bound together by any mutual contract. I think this provision for the election of committeemen and officers is practically only a form. The rules do not provide

for a quorum. They lay down no conditions as to place of meeting or length of notice or personal summons to members. It is certain that the members are scattered over a very wide field; and there is no evidence that, except by accident, they know so much as each other's names, or have the means of getting to know them. How can this scattered body effectively control the managing committee and the secretary? Why should this general meeting concern them? The members as such are not liable beyond their subscriptions. They can always decline to renew their membership. The sum they pay is small. Profits are not distributed. The only matter of practical concern is to get their letters of inquiry answered. When examined, the mutual principle does not really differ from the individual principle. There is none of that "reciprocity of interest" which this Court relied on in *Hunt v. Great Northern Railway*. (1) If this case be regarded merely as one of purchase of false information from Wilmshurst, and resale of it to Mr. Kydd, no new question arises; but in any view of the facts the essential thing is that in *Macintosh v. Dun* (2) and in the present case practically the same business was carried on, and for all practical purposes in the same way. The Scotch cases of *Macdonald v. McColl* (3) and of *Keith v. Lauder* (4) have been cited, but do not, in my opinion, assist us. The first case on the facts the Court treats as being merely one of an association for lawful objects, in which the defendant, a member, was legitimately interested, and of a statement made in furtherance of those objects. If so, no difficulty arises. In the second, the publication was the converse of the present one, and was made to the secretary of an association incorporated to circulate information among its members, and to keep a register of employees who had misconducted themselves. The statement was made by the manager of a company which was entered in the association as a member, in order that he might enable the secretary to post up the register. With all respect to the learned judges I am unable to extract from their judgments, as reported, any definite

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(1) [1891] 2 Q. B. at p. 192, per Fry L.J.
(2) [1908] A. C. 390.
(3) (1901) 3 F. 102.
(4) 8 F. 356.

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principle; but the facts of the case make it distinguishable from the present one. In *Barr v. Musselburgh Merchants Association* (1) *Macintosh v. Dun* (2) was distinguished upon the facts that the association's members were all traders at Musselburgh who had formed an association for their own protection; and hence both "the parties making and the parties receiving" the communication (a black list of defaulters) "have a legitimate business interest in the communication." The communication "was made by the association in the conduct of its own affairs, in cases where the interest of each and every member is concerned." It is enough for me to say that this is by no means the view that I take of the facts before us.

A few of the English cases cited require special attention. In *Waller v. Loch* (3) the Charity Organisation Society was rendering almost national service in protecting public charity from abuse. Sir George Jessel M.R. clearly bases the privilege on the fact that the society was discharging a public function of high importance, namely, (1.) investigating cases deserving of the care of general charity, and (2.) the repression of mendicity. Cotton L.J. says it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it "when asked by persons who wish to know whether the applicants are deserving objects." Brett L.J. simply purports to follow *Davies v. Snead*. (4) Hence *Waller v. Loch* (3) has no relevance to the present case as a decision. It is only the obiter dictum contained in the last sentence of the judgment of Brett L.J. that is relied on (5): "If a person, who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication." If this sentence is read strictly, and applied to inquiries about "character," I have nothing to say to it here. If it includes the person's mercantile credit, it is in conflict with *Macintosh v. Dun* (2), and in my opinion goes too far. In the present case, the

(1) 1912 S. C. 174.

(3) 7 Q. B. D. 619.

(2) [1908] A. C. 390.

(4) L. R. 5 Q. B. 608.

(5) 7 Q. B. D. at p. 722.

association was not even exercising that one among its various functions which most resembles that of the Charity Organisation Society, namely, the distribution of warnings against swindlers. It was purveying to A. information which he sought about B. for his own private advantage. I do not say this function is less meritorious than the one exercised in *Waller v. Loch* (1), but it is quite different. The association may be privileged in some of its publications, and not in others. No one would claim privilege for what it publishes in its newspapers. I doubt if the case of *Robshaw v. Smith* (2) is completely reported. No more virtue attaches to shewing a letter than to stating its contents by word of mouth. Grove J. says (3): "When applied to he," the defendant, "did give such information as he possessed. He might have refused to give that information. . . . But he was entitled to give his opinion when asked, and a fortiori, as it seems to me, to show any letters he had received bearing on the subject. . . . Every one owes it as a duty to his fellow men to state what he knows about a person when inquiry is made." Lindley J. says: "It would be a lamentable state of the law, if when a person asks another for information, that other could not give such information as he possessed without exposing himself to the risk of an action. . . . Mr. Smith was under no duty to speak, it is true; but he was entitled to say what he knew if he chose to do so." If these expressions are treated as of universal application, they certainly go beyond any other case, and are inconsistent with many. They would be a mere charter for gossip. As Grove J. bases himself on the proposition in *Davies v. Snead* (4), that "when a person is so situated that it becomes right in the interests of society that he should tell" &c., and Lindley J. does not express himself with nearly such breadth in the later case of *Stuart v. Bell* (5), I take it that these expressions were limited to the facts of *Robshaw v. Smith*. (2) The mere possession of knowledge about a third person cannot, in itself, be the foundation of a privilege in imparting it. A man may be no less a stranger in point of interest for being no stranger in point of

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(1) 7 Q. B. D. 619. (3) Ibid. at p. 424.
(2) 38 L. T. 423. (4) L. R. 5 Q. B. 608.
(5) [1891] 2 Q. B. 341.

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information. In any view, the sentences above quoted do not apply to the case of persons who make a business of possessing information about others, and of imparting it when inquired for, and inviting inquiries. There is also a sentence in a charge of Lord Denman C.J. to a jury in *Storey v. Challands* (1): "Every one is quite at liberty to state his opinion bona fide of the respectability of a party thus inquired about." If "respectability" meant "honesty," the dictum is not material here; if it meant "commercial credit," and I think it did, whatever truth there may be in it, when the communication is between personal friends, I think it goes too far between persons whose only connection is, as here, that of a 25s. entrance fee.

It is said that the existence of such businesses as the defendant association carries on is for the public good. I do not know as to that. I assume they are of general utility, for traders generally support them, and I suppose are the best judges of their own interest, but the public good is another matter. The question is not whether it is for the public good that the business should be carried on, but whether it is for the public good that communications made in the course of that business should be privileged. Which is more for the public good, that men who elect to carry on this business, whether mutually or separately, should pay for the wrong done by their mistakes, or that people, ex hypothesi unoffending, should suffer grievous wrong unredressed, because they have been the victims of another person's mistake? The larger the ramifications of such a business, the more certain it is that errors will be committed; and, at the same time, the more impersonal will be the statements, and the less likely to have been made with actual malice. The victim may be poor as the consequence of the slander; he may be devoid of information about the employees with whom it originated, because they are distant and unknown to him; thus he may fail to prove any express malice, or indeed there may really be none, and so he will fail in his action. Certain it is that our decision will not extinguish or hamper such businesses. They thrive by the good work they do, not by impunity for wrongs done. There is no authority for saying that a calumny is privileged merely because

(1) 8 C. & P. at p. 236.

some, or even much, general good is done by uttering it; there is plenty for saying that the person calumniated must have damages unless the calumny can be justified. Public good fluctuates from time to time, and rules of law should be fixed. We should be on very uncertain ground if we were to hold that this occasion was privileged, because, as trade stands now, many traders find inquiry agencies useful. I think that we must adhere to principle, without extending the categories of privilege, and the principle in this matter is, in my opinion, correctly expressed in *Macintosh v. Dun.* (1) After very careful consideration, the Privy Council there decided to quit the current of decisions which had been running the other way for some time.

In Scotland *Bayne v. Stubbs* (2), in Ireland *Fitzsimons v. Duncan* (3), where the observations of Palles C.B. are very weighty, and many cases in Australia, Canada, and the United States, had held that the communications between inquiry agencies and their customers are made on privileged occasions. The Privy Council declared the English rule to be otherwise, and I do not think that we should question that decision under colour of distinguishing it. After carefully considering the authorities, and on the whole with a desire to protect what men of business find it beneficial to do, and to defer to the reasoning which has commended itself to Courts in the United States and in the British dominions, as well as in Scotland and Ireland, I have come to the conclusion that all attempts to distinguish the present case from *Macintosh v. Dun* (1) fail. The appeal succeeds, but the only order must be for a new trial.

BRAY J. read the following judgment:—This is an application on the part of the defendants, the London Association for Protection of Trade and J. H. Hadwen, to set aside the verdict and judgment entered against them for 1000*l.*, and to enter judgment for them or for a new trial. The defendant Wilmshurst did not appeal. The main facts were not in dispute. The London Association for Protection of Trade (whom I shall refer to as the association) were a collection of individuals who had become

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(1) [1908] A. C. 390. (2) 3 F. 408.
(3) [1908] 2 I. R. 483, at pp. 498, 499.

C. A. members of the association, but they did not form a legal entity.

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inquiries as to the means, respectability, and trustworthiness of individuals and firms. Their constitution and rules I will discuss later. Hadwen was the secretary of the association. On March 31, 1910, one Shand Kydd, a member of the association, applied to the association on an inquiry form, supplied by the association to its members for that purpose, for information as to the credit of the plaintiffs, who were drapers at Hereford, and in particular whether they were safe for, say, 20*l.* to 30*l.* The inquiry form stated that the information would be given in strict confidence and must not be divulged to any person upon any pretext whatever. The defendants, through Mr. Hadwen their secretary, in order more fully to answer the inquiry, applied for information to the defendant Wilmshurst, who carried on the business of a commercial agent and debt collector at Hereford, where the plaintiffs carried on business. The defendant Wilmshurst answered this on April 4. In his answer he stated that there were heavy debentures charged on the plaintiffs' assets which were considered out of proportion to the break-up value of the assets, but for 20*l.* or 30*l.* they were considered a fair trade risk. This answer was slightly altered by Mr. Hadwen, who then forwarded the information to Mr. Shand Kydd in the letter set out in paragraph 3 of the statement of claim. This was the libel in respect of which the jury found a verdict for the plaintiffs for 1000*l.* The defendant association and Hadwen did not plead justification, and apart from the question whether the letter was defamatory relied only upon privilege. The Lord Chief Justice held that there was no evidence of malice, but that the occasion was not privileged. The jury found that the letter was defamatory and awarded 1000*l.* damages against the defendants the association and Hadwen, and 750*l.* damages against the defendant Wilmshurst, finding malice also against the last-mentioned defendant.

The first point argued before us was whether the occasion was privileged. This is a point of great importance and considerable difficulty. I propose first to consider the question whether and, if so, under what circumstances a person (not a trade protection

association) who in answer to an inquiry as to the financial position of another writes a letter which is defamatory of that other person is entitled to say that the occasion is privileged, and next, if he is so entitled, whether the defendants are persons entitled to the same privilege. The word privilege, though well known to and understood by lawyers, is not perhaps an apt word. The true question is whether the publication is malicious, that is without lawful excuse, or, as Lord Blackburn put it, wanton. It is actionable to publish a libel without lawful excuse. It is presumed to have been published without lawful excuse until a lawful excuse is proved. It has been held that the defendant has had lawful excuse where he had a duty to make a communication to a person who had an interest in receiving it. That may be considered settled law. It was laid down in *Harrison v. Bush* (1) that a communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty. Again, in the often quoted passage in *Toogood v. Spyring* (2) Parke B. says with reference to a defamatory publication: "The law considers such publication malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency such communications are protected for the common convenience and welfare of society and the law has not restricted the right to make them within any narrow limits." Again, in *Whiteley v. Adams* (3) Erle C.J. says: "The rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest." Both those passages were cited with approval by Lord Lindley,

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(1) 5 E. & B. 344.

(2) 1 C. M. & R. at p. 193.

(3) 15 C. B. (N.S.) at p. 418.

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then Lindley L.J., in *Stuart v. Bell*. (1) Those were not cases where the statements were made in answer to an inquiry from a trader as to the financial position or responsibility of a person with whom he is intending to deal, but it seems to me that the principles of law laid down cover such a case. Certainly they do if the person of whom inquiry is made has a duty to give the information. It is not denied here that Mr. Shand Kydd had an interest in knowing the financial position of the plaintiffs. Would not the person of whom he inquired (assuming him to be an individual and not a trade association) be under a duty to give information if he had the means of knowledge which would enable him to answer the inquiry? It is not his duty to state gossip; that would be wanton. But if he has what he believes to be reliable information, is it not his duty to give that information? Is it not to the interest of the community that he should give it? Surely it is as much to the interest of the community that the trader or other person making the inquiry should not be swindled or make a bad debt as it is to the interest of the community that a master should not engage a bad servant. England is a nation of traders. Her position is due in large measure to the success of her commerce. Trade is carried on to a very large extent on credit, but how is the credit to be safely given if you cannot obtain information as to the credit of the man with whom you are proposing to deal? Solvent customers suffer from credit being given to insolvent customers. If a trader has to run a great risk of making bad debts, he must increase the price of his goods to cover himself against that risk. The very fact of the existence of these trade protection associations in considerable and increasing numbers shews how necessary it is for a trader to obtain protection against the risk of contracting bad debts. It is not only traders that require protection, but owners of land and houses who want solvent and respectable tenants, indeed any person who is about to have a transaction with another person. I can see no distinction in principle between such a case and the case of the master who is asked for the character of a late servant.

What do the authorities shew? They seem to me to be so

(1) [1891] 2 Q. B. at p. 346.

strong as to make it settled law that there is such a duty as constitutes a lawful excuse. In *Robshaw v. Smith* (1) the defendant, a bank manager, had answered an inquiry of a customer for information as to the plaintiff, who had had business transactions with the bank. In giving judgment Grove J. says (2) "he might have refused to give the information. He had no legal duty cast upon him to give any opinion. . . . Every one owes it as a duty to his fellow men to state what he knows about a person when inquiry is made; otherwise no one would be able to discern honest men from dishonest men. It is highly desirable, therefore, that a privilege of this sort should be obtained." And Lord Lindley, then Lindley J., says (2): "I am of the same opinion. I think it would be a lamentable state of the law, if when a person asks for information, that other could not give such information as he possessed without exposing himself to the risk of an action. The law on this point seems to me to have been perfectly well settled for a long time. Mr. Smith was under no obligation to speak, it is true, but he was entitled to say what he knew if he chose to do so. There could be no such thing as confidential communications between man and man if such an action as this was to lie. The case of *Davies v. Sneed* (3) quite bears out this, and some one has kindly handed me an American authority, Townshend on Slander, p. 231, which is to the same effect." It is true that this was the case of a bank manager answering inquiries of a customer, but no reliance was placed by the learned judges on this fact and the proposition of law is stated quite generally. Every one owes it as a duty to his fellow men to state what he knows about a person when inquiry is made. It is to be observed that in that case the information which was communicated was hearsay information, not the knowledge of the person giving it, for it consisted of an anonymous letter. In a much earlier case of *Storey v. Challands* (4) the summing up of Lord Denman C.J. to the jury was to this effect, as stated in the head-note to the report: "If A. is going to have dealings with B. and he makes inquiry of C., who gives A. information respecting B., this is a

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(1) 38 L. T. 423.

(3) L. R. 5 Q. B. 608.

(2) *Ibid.* at p. 424.

(4) 8 C. & P. 234.

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privileged occasion, as every one is quite at liberty to state his opinion bona fide of the respectability of a party thus inquired about." It did not appear that in this case there were any particular relations between A. and C. or between B. and C. In *Waller v. Loch* (1), a case I shall have to refer to again, Lord Esher, then Brett L.J., stated the law in the following passage: "If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered, and if answered bona fide and without malice, the answer is a privileged communication." Sir Edward Clarke said, as he was bound to say, that this was not good law. I think it is. It is the same law that is laid down in the cases I have already referred to. It introduces the condition that the person to whom the inquiry is addressed is a person who has means of knowledge. That is not necessarily knowledge of his own, but knowledge which he can obtain, but it excludes, and properly excludes, the case of a gossip. It cannot be disputed here that both the association and Hadwen had means of knowledge. They had stored up a mass of information and they had correspondents in different towns who also had information.

No authority was cited to us to the contrary. The judgment of Lord Macnaghten in *Macintosh v. Dun* (2) implies rather than denies that there is such a privilege in the case of an individual who is not carrying on a business for profit. On examination of all the authorities I have come to the clear conclusion that the passage I have quoted from Lord Esher's judgment in *Waller v. Loch* (1) is sound law, and it is important to notice that he applied it to a case where the defendant was the secretary of an association of individuals, namely, the Charity Organisation Society. It is said that there is a distinction between the case of a man who gives information he already possesses and the case of a man who, receiving an inquiry, seeks and obtains information, and then answers it. I cannot find that distinction laid down in any case. A master who is asked for the character of his servant may know little about the servant, but he makes inquiry of his other servants, or of his wife, or other members of

(1) 7 Q. B. D. at p. 622.

(2) [1908] A. C. 390.

his household, and then answers. Is the privilege gone? It is true that the person of whom the inquiry is made is not bound to obtain the information, but, having obtained it, is it the less his duty to communicate it because he obtained it after instead of before the inquiry? The Charity Organisation Society necessarily have to make inquiries where they have no information at the time of the inquiry, yet it would be quite inconsistent with *Waller v. Loch* (1) and the reasons there given to hold that when the society has the information already the answer is privileged, whereas if they have to get it the answer is not privileged. In *David Jones v. Basma House* (2), to which I shall refer later, it was stated by the Master of the Rolls that the information they (that is the association) had was derived partly from agents employed by the association, and yet he considered the occasion privileged. If it be good law it establishes the first proposition, namely, that the privilege exists in the case of an individual.

I now come to the question which gives rise to the present difficulty, Does the privilege which exists in the case of an individual apply in the case of an association like this and its secretary? It is necessary to see what this association was. It was not, as I have said, a legal society; it was merely a collection of individuals who had joined together for a common purpose. It had been established as long ago as 1842. Its objects are stated in the small book which was called a prospectus. The first object was "the making of private inquiries as to the means, respectability and trustworthiness of individuals and firms." There were seven other objects which included (2.) the collection of debts, (3.) the detection and exposure of swindlers, (4.) the issue of a weekly gazette containing particulars of bills of sale, county court judgments, &c. The annual subscription was 1*l.* 1*s.* for town members, 1*l.* 5*s.* for country members, and 1*l.* 10*s.* for foreign members. For the gazette and monthly journal additional subscriptions had to be paid. Every member was entitled to ten inquiry cheques or forms in each year. If a member required further inquiry cheques he had to pay at the rate of 10*s.* for a book of ten cheques. For

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(1) 7 Q. B. D. 619.

(2) Unreported.

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special inquiries a member had to pay more. At the end of the prospectus it was stated (and the rules shew the same) that the association was a mutual society, belonged to its members, and was managed by a committee of members in the interest of members, and it set out the advantages of a mutual society thus: "A society owned and managed by others than members can be utilized for the purpose of fraud; such cases are constantly occurring. A mutual society cannot be used in this way for it is managed by a committee of members elected by the body of members. The committee receive no remuneration for their work, but they are always endeavouring to improve the society and make it more valuable. Business men themselves, they know the needs of business men and benefit in their individual capacity by the improvement secured in the society. A business man having realized the value of a trade protection society should join one that is mutual, in which no profits go to any individual, and which gives the members the full value of services for their subscriptions." The rules provide that the association should consist of all the present members and of such other members as might be elected in the manner hereinafter stated. By rule 2 it is provided: "That the business of the association be carried on under the superintendence of a committee of management whose services shall be purely honorary, assisted by the secretary and solicitors of the association for the time being, which committee shall consist of at least twenty members of the association, three to be a quorum, who shall have authority to make by-laws, to appoint and dismiss officers and do all such other acts on behalf of the association as may be deemed requisite by them for the furtherance of its objects and interests." Then it provided for an annual general meeting of the members and for the election of the committee of management, and for special general meetings on requisition. Rule 16 provided that the property of the association and any funds which it had accumulated should be vested in trustees, to be used and dealt with by them in furtherance of the objects of the association as the committee should direct. The balance-sheet and accounts of the association for the year 1911 were put in. They shewed that the accumulated funds amounted to about

11,000*l.*, and that the surplus of receipts over expenses for that year was nearly 700*l.*

The association being what I have described, had it lawful excuse when its secretary wrote and sent to Mr. Shand Kydd the libel complained of? A number of traders combine together to do more economically, and probably much better, what each would otherwise have to do for himself. They appoint a committee of management consisting of some of themselves. They authorize that committee to appoint a secretary and a staff to carry out what they want done, namely, to obtain and furnish in answer to inquiries from the members information as to the financial responsibility of the persons with whom the member inquiring desires to deal. Do not the committee owe a duty to each member making an inquiry to supply information? That is what the committee are elected by the members to do. If the committee themselves supplied the information they had obtained, surely that would come within the principle of the cases I have referred to. The rules, however, provide that they are to appoint a secretary and staff to make the inquiries and supply the information on their behalf. Does that deprive them of their lawful excuse and privilege? If an inquiry is made of a merchant or banker, may not the merchant or the banker depute his manager, or his clerk, to make inquiries and supply the information? Is he less performing a duty, or is there an absence of lawful excuse, because he supplies the information asked for in this way? Surely, this cannot be. The exigencies of business make it impossible that the principal shall always do the business himself. If the principal had to do it himself the inquiries would really not be answered at all, and if the principal could not make the inquiries by others he would obtain less information, and the information given might be less trustworthy. Would it be for the benefit of the community that the privilege should be restricted within such narrow limits? Then what is the privilege of the secretary? If it is conceded that the principal may depute his servant to answer the inquiry, it follows that the servant must be entitled to the same privilege. He has the same duty and the same excuse.

So far, I have not considered the question whether it makes

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any difference that the person making the inquiry pays for the answer to his inquiry. Why should it? Is the duty of the person giving the information the less because he is paid for fulfilling it? If a trader writes to a merchant asking for information and does not offer to pay him for his trouble in answering, is the answer privileged, but not so if the trader does offer to pay for the merchant's time and trouble? It seems to me in reason and on principle that the duty and lawful excuse exist to the same person and to the same extent whether the answer be the answer of an individual or the answer of a mutual society to the trader's inquiry. I wish to guard myself by saying that I am dealing with the case of an answer to an inquiry and not with the case of information volunteered. Further, I am assuming for the present that the defendants are not an association carrying on a business for profit.

I must now consider how the authorities stand. There are few cases in the English Courts. The first brought to our notice was the case of *David Jones v. Basma House* (1), the only report of which was in the *Shoe and Leather Record*. It was a case decided in 1907, and the judges were the present Master of the Rolls, Fletcher Moulton L.J., and Buckley L.J. According to the report it would seem that the association was identical with the defendant association except in one respect, that it was apparently confined to members in the boot and shoe trade. In describing the association the Master of the Rolls says: "It is important to consider in the first place what the nature and position of the association is. It is not an association carrying on business for profit. It is an association the primary object of which is to protect by means of the diffusion of information members of the association against persons whose character or circumstances render them unworthy of mercantile credit; in fact, it is to enable traders in this particular branch of trade to carry on business with safety, which could scarcely be done without some reasonable means of affording to members of the association information as to the position of persons with whom they are invited to deal." Then after a few words he says: "It was formally admitted in

(1) Unreported.

the Court below, and could not be disputed, that the alleged libel in question was on a privileged occasion, and that the plaintiff cannot succeed unless he can establish express malice." Fletcher Moulton L.J. said: "I am of the same opinion. The defendant society is of a type that is found necessary in many businesses. It is a mutual information society intended not only to protect its members from trusting people who are unworthy of it, but also to enable those members to know how far they can safely trust their would-be customers; and in the conduct of a business like that of the defendants it is quite a mistake to think that those in charge of it are only inclined to damage the credit of those who wish to purchase. What they want to find out is their true financial stability, and, although no doubt they keep on the side of caution, they are always glad to assure members of the society that they could trust customers, because, of course, business is done in England so largely on credit, and their real object is to guide members of the society as to how far they may safely go. Now; this society is conducted on an immense scale. They must have a staff of clerks for the purpose of doing that, and as we have seen from the books they have the most elaborate entries and reports of inquiries that have been made, reaching back in many cases for years. That some slip should be made in the conduct of a business of that kind is absolutely inevitable. It is admitted that there is privilege in the communication with members of the society, and therefore in order to support his case, the plaintiff must prove express malice, that is to say, he must negative mere negligence." Buckley L.J. agreed. If the question of privilege had been fully argued that was a decision by which this Court would be bound. There is only the one difference between the association there and the defendant association, namely, that there it was confined to members of the particular trade. I cannot see that that can make any difference in law. The duty and the lawful excuse are the same. It cannot be said that the duty ceases to exist because butcher, baker, and grocer have combined. If there were no general association to include all trades, the small trades that have not members enough to form an association would have to go without the protection. They would have to make their own

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inquiries, or do without the information they want. Now, it is true that the question of privilege was not argued, but it was clearly in the minds of all the judges. The Master of the Rolls said that it could not be disputed, and both he and Fletcher Moulton L.J. went at length into the nature and position of the association, and expressed the strongest opinion that such an association was almost, if not quite, necessary for the purpose of protecting traders.

The next case is *Waller v. Loch* (1), to which I have already referred. That was the case of a society formed for the purpose, amongst others, of preventing charitably disposed persons from helping people who did not deserve to be helped, and assisting them in finding out deserving persons. The defendant, Loch, was the secretary, and he had written the libel complained of in answer to an inquiry from a member of the society. The member had made the inquiry as to the character of the plaintiff because a friend of his was about to help the plaintiff. It was held by Sir George Jessel and Lord Esher, then Brett L.J., that the occasion was privileged. It differs from the present case only in this, that in the one case the society had been formed to protect charitable persons from being imposed upon, and in the other to protect traders in their business dealings. I think in principle there is no distinction between the cases. Assuming the defendants to be an association not carrying on business for profit, I think this case is really undistinguishable, and if so, of course this Court is bound by it. So far as I am aware, those were the only cases in the English Courts before *Macintosh v. Dun.* (2) In the Scotch Courts, however, the same view has been taken in *Keith v. Lauder.* (3) An association had been formed of owners of steam fishing vessels. It was incorporated under the Companies Acts for collecting and circulating statistics and information relating to fishing or shipping industries. In November, 1903, it was resolved that a register of defaulting crews should be kept, and that a member should report to the secretary any member of a crew defaulting, and that the secretary should inquire into it. The defendant Lauder was a member, and

(1) 7 Q. B. D. 619.

(2) [1908] A. C. 390.

(3) 8 F. 356.

reported the plaintiff to the secretary as having been drunk and having refused to go to sea. The secretary entered this on the register, and sent a circular letter to the members, intimating that the plaintiff had been reported. It was held by Lord Kyllachy, Lord Stormonth Darling, and Lord Low that the occasion was privileged, and that the objects of the association were lawful. Lord Kyllachy said (1): "Prima facie he," the defendant, "must be held to have been acting, if not strictly in the performance of a duty, at all events in exercise of a right." Lord Stormonth Darling held that it was privileged because of the legitimate interest which the defendant and other members of the association had in knowing what the experience of each of them had been with respect to their crews. In *Fitzsimons v. Duncan* (2) the Court in banc held that Kemp & Co., who were a firm of mercantile inquiry agents, were entitled to claim privilege for a communication they had made in answer to an inquiry from an agent. Palles C.B. said (3): "It is essential to the due carrying on of mercantile business that a wholesale trader, who contemplates selling on credit to a retail trader, should be entitled to make fair and reasonable inquiries as to the solvency of the latter; and if he has that right, so also must he be entitled to depute to another the duty of making those inquiries. Thus, the clients here, Messrs. Simmons, Hay & Co., to whom the alleged libel was published, had an interest in the subject-matter of the communication, i.e. the result of the inquiries, and Kemp & Co., who had accepted their deputation, had become and were subjected to the duty of doing that without which such deputation would be of no avail, viz., of making known to their principal the fair result of their honest inquiries. These considerations are sufficient to render the occasion a privileged one." The Court of Appeal did not differ from this conclusion, but having read the judgment in *Macintosh v. Dun* (4) did not decide the point.

Up to *Macintosh v. Dun* (4) the authorities seem to me to have been all one way, and it remains to consider that case. It was there held, reversing the orders of both Courts in Australia, that a

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(1) 8 F. at p. 360.

(2) [1908] 2 I. R. 483.

(3) Ibid. at p. 494.

(4) [1908] A. C. 390.

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communication made by a mercantile agency who were carrying on a business for profit to a trader who had inquired as to the solvency of the plaintiff was not privileged. On careful examination of the judgment of Lord Macnaghten it will be found that the important facts on which his judgment was founded are absent here. First, it was clear that the defendants were not an association of persons who had combined together for their mutual protection, but were a firm carrying on the business of obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere. They were the proprietors of the business, which was not a mutual society in any sense of the word. Second, the business was carried on for profit. Third, although there was a specific request for the information, in fact, to use the words of Lord Macnaghten at the bottom of p. 399, "The defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The defendants, in fact, hold themselves out as collectors of information about other people which they are ready to sell to their customers." In fact, he held that the defendants there were to be regarded as volunteers. He said: "It is a matter of business with them. Their motive is self-interest. They carry on their trade just as other traders do, in the hope and expectation of making a profit." Lord Macnaghten proceeds on p. 400: "Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence, or from a bona fide sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people?" And after describing more exactly the nature of the defendants' business he answers the question in the negative. Those were the grounds of the decision. Now in the present case, as I have already pointed out, and as the rules (the genuineness of which was not challenged) shew, the defendants were not proprietors of any business. They were a collection of individual traders combining for their own protection. Next, they were not carrying on a business for profit. The Lord Chief Justice did not consider this material, and did not put the

question to the jury, but in my opinion there was no evidence that they were carrying on a business for profit in the sense in which the word profit was used by Lord Macnaghten. Rule 16 provides that the property of the association and any funds which it has accumulated shall be vested in the trustees of the association to be used and dealt with by them in furtherance of the objects of the association. None of the objects are profits. The association has existed since 1842, over seventy years, and never has distributed a penny to its members, nor could it lawfully do so under its rules. It is true, of course, that the association exists for the advantage of its members. So does every club. So did and does the Charity Organisation Society, and so do the City companies, and a great number of other societies. Then it was said it has accumulated large funds. So do clubs and the other bodies I have mentioned. So do the Inns of Court. I hope it is not uncommon in these cases that the receipts from the fees of their members, and the rents of their property, should exceed their outgoings, and this has been the fortunate lot of the association here. Could it be contended that the privilege exists so long as the association does not accumulate funds or has no surplus, but ceases as soon as they do? It is necessary that an association of this kind should have a reserve fund. Their servants or agents may be guilty of malice, and involve the association in large liabilities. Can the privilege depend on the amount of their reserve fund or their surplus? The association cannot, in my opinion, be said to be carrying on a business for profit. Protection, not profit, is their object.

Third, is it true that the defendants here volunteered the information, or that the defendants held themselves out as collectors of information about other people which they were willing to sell to their customers? There was no evidence here that the defendants solicited persons to become members, or published the prospectus to any one but to persons who had desired to become members, or that they had in any way set themselves in motion and invited the request of Mr. Shand Kydd. Can it be truly said here that this communication to Mr. Shand Kydd was made by the defendants from motives of self-interest by persons who trade for profit in the characters of other people?

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I can quite appreciate that it might not be to the interests of the community or for the welfare of society that what were called in the argument "character shops" should have the privilege, but an association like that of the defendants here stands on quite a different footing. The judgments of the Master of the Rolls and Fletcher Moulton L.J. in *David Jones v. Basma House* (1), and the judgment of Palles C.B. in the Irish case to which I have already referred, clearly shew their opinion on this point, and demonstrate, as it seems to me, how much it is to the interest of the community that these combinations should exist; and although the question of the interest of the community is a question of law and not of fact, it helps to confirm the opinion I have formed that a Manchester special jury should have come to the same conclusion. Since *Macintosh v. Dun* (2) there have been two cases, one tried before Darling J. of *Elkington v. London Association for Protection of Trade* (3)—that is, the present defendants. There the jury found that the defendants were an association collecting and distributing information only for and to their own members for their mutual protection in business. Darling J. held, nevertheless, the occasion was not privileged. He said: "The defendants' paper in the present case was not published for the benefit of society

(1) Unreported.

(2) [1908] A. C. 390.

(3) 28 Times L. R. 117.

at large, but only for a limited class," and that being so, he thought he was bound to hold that the occasion was not privileged. I have already dealt with the question whether the interest of traders in general was not the interest of the community, but in my opinion that is not conclusive; the true test is whether the duty existed. If the duty exists it is for the benefit of the community that it should be discharged. As, however, the jury answered other questions in favour of the defendants, judgment was entered for them, and no appeal therefore could be brought by the defendants. There was this further distinction, that the publication was not in answer to any special inquiry, but that the libel appeared in a weekly journal sent to subscribers. The other case was in the Scotch Courts, *Barr v. Musselburgh Merchants Association*. (1) It was an action against a local association of traders, for sending round to its members a list of persons which included the plaintiff, the list being understood to be a black list, or list of persons unworthy of credit. The Court held that it was a libel on the plaintiff, but that the occasion was privileged. Lord Dundas distinguished *Macintosh v. Dun* (2) on much the same grounds as I have endeavoured to do. Lord Salvesen and the Lord Justice-Clerk agreed. That case is not, of course, binding on us, but it is the opinion of three learned judges, and it expressly decides the point we have to decide.

In my opinion, the case of *Macintosh v. Dun* (2) is distinguishable, and both in principle and on authority the occasion of the publication of this libel by the association and by Hadwen was privileged.

This, however, does not finally decide the case, because Sir Edward Clarke argued (1.) that Wilmshurst was the agent of the defendant association and that his malice was their malice, and (2.) that they were joint tortfeasors, and the malice of one tortfeasor is the malice of the other.

Now first as to the agency. Sir Edward Clarke put in the answers of the defendant association and the defendant Hadwen to interrogatories. In those answers Wilmshurst was stated to be an "accredited correspondent," and all that was done between

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(1) 1912 S. C. 174.

(2) [1908] A. C. 390.

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Wilmshurst and the other defendants with reference to this libel was that Hadwen addressed the inquiry to Wilmshurst, and received from him the answer to which I have referred. Hadwen was also examined at the trial, and stated that beyond sending reports in answer to inquiries, for which he was paid a fee of 6d. and postage, Wilmshurst did nothing whatever for the defendant association. That, in my opinion, does not make him an agent. *Fitzsimons v. Duncan* (1), the case in the Irish Courts, was cited, but in that case Duncan was described by Kemp & Co. as their local agent. So far as appeared, the defendant association had no control over Wilmshurst at all. He kept a character shop, and the association was one of his customers. In my opinion, there was no evidence on which the jury could have found that Wilmshurst was the agent of the other defendants, so as to make his malice their malice. But the Lord Chief Justice treated it rather as a question of law, I suppose in consequence of Sir Edward Clarke's second contention, namely, that they were joint tortfeasors. But it is only by supposing that the other defendants were responsible for Wilmshurst's malice that they are tortfeasors at all. If the occasion was privileged, and there was no malice, the other defendants were, under the circumstances of the case, committing no wrong. No case was cited in support of his contention, and unless Wilmshurst was the agent of the other defendants, I cannot see how they can be made responsible. I desire to guard myself by saying that I am not holding that there may not be cases of joint publication, where the malice of one is the malice of the other; but it is not so in this case. There may be a case where one joint publisher has to rely on the privilege of the other, and the malice of that other may destroy the privilege of both. I desire to leave such a case open. The association here are relying on their own privilege, not on any privilege of Wilmshurst.

There is, however, a further answer. It is not true to say that there was a joint publication here. There were two libels, not a joint publication of one libel. Wilmshurst, of course, knew that some use would be made of the information he gave,

(1) [1908] 2 I. R. 483.

but how and to what extent he did not know; nor did he know what additional information Hadwen would give.

It might well be that the damages caused by the other defendants' publication would be recoverable against him in an action founded on the letter he wrote to Hadwen, as being the natural consequence of his own letter, but I fail to see how he can be said to have published Hadwen's answer to Shand Kydd.

I have given my best consideration to this case, but the conclusion I have come to is that the occasion is privileged, and there is no evidence of malice; and the defendants, the association and Hadwen, are entitled to have judgment entered in their favour.

These are not the days when we ought to narrow the law of privilege or lawful excuse. The exigencies of business rather require that it should be extended, as Erle C.J. said in *Whiteley v. Adams*. (1) Actions of libel are overdone, and I think we have too many in these Courts. There is no country in the world where there are so many, or where such large and often excessive damages are awarded.

There are further points which were raised, which I must notice. The verdict and judgment here were on the footing that there had been a joint publication, yet separate damages were given and a separate judgment entered against each defendant, as against the defendant Wilmshurst for 750*l.* and as against the defendant association and Hadwen for 1000*l.* It was argued that, the action being founded on a joint publication of one libel, there could be only one joint judgment against the two. This is a most important point, as actions of libel against two or more defendants are now very common. The proprietors of a newspaper and the printers are often joined as defendants. I can say from my own experience with some confidence that it has been quite common since the Judicature Act for the judge to direct the jury to find the damages separately against each defendant; and for the jury to find separate damages. I have always thought it wrong; but it has not happened that I have ever had a case of this kind before me. After the argument that

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(1) 15 C. B. (N.S.) 392.

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has taken place, I retain my opinion. In the case decided by Lord Mansfield of *Hill v. Goodchild* (1), it was held that where there was a joint defence there could be but one judgment; but the point whether there must be but one judgment where the defendants severed their defence was left open. I cannot see how the conduct of the defendants in severing their defence should make any difference. It is but one cause of action. If it is a joint tort there is only one wrong, not two wrongs. The actual damage to the plaintiff is one and entire. Each defendant is responsible for the whole damage. How are the jury to divide it? If it is not a joint judgment the plaintiff must be entitled to issue execution on both judgments, and put in his pocket both the amounts awarded. The plaintiff might be prejudiced by the damages being divided, and this prejudice will happen to him by reason of something which he cannot control, namely, the severance of the defences. I think the present practice grew up after the passing of the Judicature Act, perhaps because it was thought that that Act authorized two actions being brought in one, and the jury were therefore directed to treat it as two actions. It does not appear that this point has ever been raised in the Court of Appeal; but having been raised, it seems to me important that we should decide it; and I have come to the clear conclusion that only one judgment can be entered. This has been expressly held in the Irish Courts in *Dawson v. M'Clelland*. (2) There A., B. and C. were sued jointly for libel; but C. put in a separate defence. The jury gave 5*l.* each damages against A. and B., and 100*l.* against C. The Court ordered a new trial, and Andrews J. in giving judgment said (3): "I regard it as having been settled that in an action against joint tortfeasors as such, the damages could not be severed, and assessed against the defendants separately, whether they united or severed in their defences, and in my opinion an action for libel was no exception to this rule." Boyd J. said (4): "It makes no difference that the defendants may have severed in their defences and pleaded separately." Reference is made to *Sir John Heydon's Case* (5),

(1) 5 Burr. 2791.

(2) [1899] 2 I. R. 486.

(3) *Ibid.* at p. 490.

(4) *Ibid.* at p. 493.

(5) 11 Rep. 5*b.*

and that case supports their decision. This point was not raised in the Court below in the present case. That, however, is not conclusive (see *Bray v. Ford* (1)); but notwithstanding that case, the Court ought not, I think, to allow a new point to be raised on appeal, if the party raising it had an opportunity of doing so in the Court below and intentionally forbore to do so. I do not think this can be said in this case. It had been so much the regular practice to assess the damages separately that I think counsel at the trial probably overlooked the point. In my opinion these appellants would be entitled to have the separate judgments set aside, and a new trial ordered, if I were wrong in holding that the defendants were entitled to the judgment; but the point not having been raised at the trial, the question of costs would have to be considered, if this were the only ground on which a new trial were ordered.

There was one more point, namely, whether the damages were excessive. As far as the defendant association and Hadwen were concerned, there was nothing to shew that the publication of the libel by them had or could have produced any pecuniary damage to the plaintiffs. The plaintiffs did not allege that they lost Shand Kydd's order. There was no reason to suppose that Shand Kydd had communicated the contents of the libel to any one. There was no malice on the part of these defendants—only negligence. The plaintiffs themselves attributed the whole of the damage to Wilmshurst. Under these circumstances, it seems to me to be absurd to give 1000*l.* damages against the defendant association and Hadwen. The jury must have arrived at their verdict on some wrong ground. It was said that Mr. Smith had attacked the plaintiffs in his cross-examination and speeches; but he did not attack their solvency or reputation in any way; he merely attacked their tactics in sending the trap letters. Assuming that this was a ground for increasing the damages, of which I am not sure, the damages in my opinion were clearly excessive. I agree, therefore, with Vaughan Williams L.J. and Hamilton L.J. that the appellants are at least entitled to a new trial; but I have the misfortune to

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C. A. differ from them upon the question whether the occasion was privileged.
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New trial ordered.

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Solicitors for plaintiffs: *Ford, Lloyd, Bartlett & Michelmores, for Houchen, Houchen, Greenland & Sword, Attleborough.*

Solicitors for defendants, London Association for Protection of Trade and Hadwen: *Hutchison & Cuff.*

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*May 7;
July 7.*

SCRIVEN BROTHERS & CO. v. HINDLEY & CO.

[1912 S. 3280.]

Sale of Goods—Auction—Misleading Catalogue—Lot put up for sale—Mistake by Bidder as to Subject-matter—Action for Price—Parties not ad idem.

The plaintiffs instructed an auctioneer to sell by auction a number of bales of hemp and of tow. The goods were described in the auctioneer's catalogue as so many bales in different lots with the same shipping marks and without disclosing the difference in the commodities. Before the sale samples of the hemp and tow were on view in a show-room on the floor of which the catalogue numbers of the lots of hemp and tow were marked in chalk opposite the respective samples, and the defendants' manager examined the hemp but not the tow, as he was not intending to bid for tow. When the lots representing the tow were put up for sale in the auction room the defendants' buyer made a bid which was an extravagant price for tow, and the lots were at once knocked down to him.

In an action against the defendants for the price of the tow the jury found that the auctioneer intended to sell tow; that the defendants' buyer intended to bid for hemp; that the auctioneer believed that the bid was made under a mistake, but that he had reasonable grounds for believing that the mistake was merely as to value; that the form of the catalogue and the negligence of the defendants' manager in not more closely examining the samples at the show-room and identifying them with the lots in the catalogue contributed to cause the mistake:—

Held, on these findings, that the parties were never ad idem as to the subject-matter of the proposed sale, and that there was, therefore, no contract of sale.

Held, also, that the finding of the jury as to the negligence of the defendants' manager ought to be disregarded, as he owed no duty to the plaintiffs to examine the samples of tow.

FURTHER CONSIDERATION of an action tried by A. T. Lawrence J. with a jury.

The action was brought to recover 476*l.* 12*s.* 7*d.*, the price of some Russian tow alleged to have been sold at auction on behalf of the plaintiffs to the defendants. The defendants denied that they had agreed to buy the tow, and alleged that they had bid at the auction for Russian hemp, and that the tow had been knocked down to them under a mistake of fact. The facts as stated by the learned judge in his written judgment were as follows:—

Mr. Northcott, an auctioneer and broker doing business at the Commercial Sale Rooms, London, was employed by the plaintiffs to sell, *inter alia*, a large quantity of Russian hemp and tow. The goods were lying in the docks, and samples were on view at Cutler Street show-rooms. The catalogue prepared by Northcott contained the shipping mark "S. L.," and the numbers of the bales in two lots, namely, 63 to 67, 47 bales, and 68 to 79, 176 bales. The former were hemp, and the latter were tow; the catalogue did not disclose this difference in the nature of the commodity. At the show-rooms bales from each of these two lots were on view, and on the floor of the room in front of the bales was written in chalk "S. L. 63 to 67" opposite the samples of hemp, and "S. L. 68 to 79" opposite the samples of tow. These marks were placed on the floor of the gangway along which persons inspecting samples walked. Macgregor, the defendants' buyer, bid for the 47 bales, and these were ultimately knocked down to him at 24*l.* 0*s.* 6*d.* per ton. The 176 bales were then put up, the defendants' buyer bid 17*l.* per ton (an extravagant price for this tow), and they were at once knocked down to him. The auctioneer said that he announced this lot as "mixed tow," but this was denied. It was ultimately admitted at the trial that the defendants' buyer bid under the belief that the goods were hemp, whereas in fact the lot consisted of very inferior tow, "mere rubbish," as several witnesses said. It was stated by witnesses on both sides that in their experience Russian hemp and Russian tow were never landed from the same ship under the same shipping marks. The defendants' manager, Mr. Gill, who had inspected the samples of "S. L." hemp at Cutler Street, had been shewn two bales of hemp as "samples of the 'S. L.' goods" by Calman, the foreman in charge of the show-rooms. He did not wish to buy tow, and consequently had not

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inspected the samples of tow, or had his attention in any way called to the fact that the tow was also marked "S. L." He instructed Macgregor to bid for the 47 bales up to a limit of 25*l.*, and for the 176 bales to a limit of 23*l.*, in the belief that both lots were hemp. He had given no instructions for the purchase of tow and had no intention of buying tow. His reduction in price was due, he said, to his requirements and the size of the second lot.

The plaintiffs contended that the mistake was only a mistake as to value and was not one as to the subject-matter of the apparent contract.

The jury in answer to questions found : (1.) That hemp and tow are different commodities in commerce. (2.) That the auctioneer intended to sell 176 bales of tow. (3.) That Macgregor intended to bid for 176 bales of hemp. (4.) That the auctioneer believed that the bid was made under a mistake when he knocked down the lot. (5.) That the auctioneer had reasonable ground for believing that the mistake was merely one as to value. (6.) That the form of the catalogue and the conduct of Calman, or one of them, contributed to cause the mistake that occurred. (7.) That Mr. Gill's "negligence" in not taking his catalogue to Cutler Street and more closely examining and identifying the bales with the lots contributed to cause Macgregor's mistake.

Hume Williams, K.C., and *Cassels*, for the plaintiffs. On the findings of the jury the plaintiffs are entitled to judgment. Although the defendants' buyer believed mistakenly that he was bidding for hemp, the auctioneer was no party to that mistake, for the jury have found that the auctioneer had reasonable ground for believing that the buyer's mistake was as to value only. A vendor is under no obligation to inform a purchaser that he is acting under a mistake, if the mistake is not induced by any act of the vendor: *Smith v. Hughes*. (1) A reasonable opportunity was given to the defendants' buyer to ascertain what it was that was going to be sold, and, he having made a mistake, it is not open to the defendants now to say that they are not liable for the price of the goods because the parties were not *ad idem* :

(1) (1871) L. R. 6 Q. B. 597.

Hallows v. Fernie (1); *Tamplin v. James*. (2) But there is in this case an additional reason why the defendants' case fails. The jury have found that it was by reason of their own negligence that the mistake was made. They are, therefore, estopped from saying that there was such a mistake as to prevent there being a contract of sale. [*Duke of Beaufort v. Neeld* (3), *Little v. Spreadbury*, (4) *In re Arnold* (5), and *Kennedy v. Panama Mail Co.* (6) were also referred to.]

E. M. Pollock, K.C., and *R. A. Wright*, for the defendants. The first, second, and third findings of the jury establish that there was a mistake by both parties as to the subject-matter of the sale, and the parties were therefore never ad idem, and there was no binding contract: *Raffles v. Wichelhaus* (7); *Thornton v. Kempster*. (8) *Smith v. Hughes* (9) is not in point, for in that case there was clearly a consensus ad idem as to the subject-matter of the contract, namely, oats, and the question was whether there was a collateral contract of warranty, or a representation by the vendor estopping him from denying the warranty, that the oats were old oats. The fifth finding of the jury does not assist the plaintiffs, for it shews that the parties were not ad idem as to price. The seventh finding of the jury should be disregarded. The matters alleged by the jury to constitute negligence on the part of the defendants' manager do not in law amount to negligence, for he owed no duty to the plaintiffs to make an examination of goods which he did not intend to buy. In the absence of duty there could be no negligence: *Carlisle and Cumberland Banking Co. v. Bragg*. (10) But in any case the plaintiffs cannot succeed on the ground of the defendants' so-called negligence, because the jury have found that the defendants' mistake was caused, or contributed to, by the form of the catalogue or the conduct of Calman: *Jones v. Rimmer* (11); *Torrance v. Bolton* (12); *Denny v. Hancock*. (13)

Cur. adv. vult.

(1) (1868) L. R. 3 Ch. 467.

(2) (1880) 15 Ch. D. 215.

(3) (1845) 12 Cl. & F. 248, at p. 285.

(4) [1910] 2 K. B. 658.

(5) (1880) 14 Ch. D. 270.

(6) (1867) L. R. 2 Q. B. 580.

(7) (1864) 2 H. & C. 906.

(8) (1814) 5 Taunt. 786.

(9) L. R. 6 Q. B. 597

(10) [1911] 1 K. B. 489.

(11) (1880) 14 Ch. D. 588.

(12) (1872) L. R. 8 Ch. 118.

(13) (1870) L. R. 6 Ch. 1.

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July 7. A. T. LAWRENCE J. read the following judgment:—
In this case the plaintiffs brought an action for 476*l.* 12*s.* 7*d.*, the price of 560 cwt. 2 qrs. 27 lbs. of Russian tow, as being due for goods bargained and sold. The defendants by their defence denied that they agreed to buy this Russian tow, and alleged that they bid for Russian hemp and that the tow was knocked down to them under a mistake of fact as to the subject-matter of the supposed contract. The circumstances were these. [The learned judge stated the facts and the findings of the jury as set out above, and continued:] Upon these findings both plaintiffs and defendants claimed to be entitled to judgment. A number of cases were cited upon either side. I do not propose to examine them in detail because I think that the findings of the jury determine what my judgment should be in this case.

The jury have found that hemp and tow are different commodities in commerce. I should suppose that no one can doubt the correctness of this finding. The second and third findings of the jury shew that the parties were never *ad idem* as to the subject-matter of the proposed sale; there was therefore in fact no contract of bargain and sale. The plaintiffs can recover from the defendants only if they can shew that the defendants are estopped from relying upon what is now admittedly the truth. Mr. Hume Williams for the plaintiffs argued very ingeniously that the defendants were estopped; for this he relied upon findings 5 and 7, and upon the fact that the defendants had failed to prove the allegation in paragraph 4 of the defence to the effect that Northcott knew at the time he knocked down the lot that Macgregor was bidding for hemp and not for tow.

I must, of course, accept for the purposes of this judgment the findings of the jury, but I do not think they create any estoppel. Question No. 7 was put to the jury as a supplementary question, after they had returned into Court with their answers to the other questions, upon the urgent insistence of the learned junior counsel for the plaintiffs. It begs an essential question by using the word "negligence" and assuming that the purchaser has a duty towards the seller to examine goods that he does not wish to buy, and to correct any latent defect there may be in the sellers' catalogue.

Once it was admitted that Russian hemp was never before known to be consigned or sold with the same shipping marks as Russian tow from the same cargo, it was natural for the person inspecting the "S. L." goods and being shewn hemp to suppose that the "S. L." bales represented the commodity hemp. Inasmuch as it is admitted that some one had perpetrated a swindle upon the bank which made advances in respect of this shipment of goods it was peculiarly the duty of the auctioneer to make it clear to the bidder either upon the face of his catalogue or in some other way which lots were hemp and which lots were tow.

To rely upon a purchaser's discovering chalk marks upon the floor of the show-room seems to me unreasonable as demanding an amount of care upon the part of the buyer which the vendor had no right to exact. A buyer when he examines a sample does so for his own benefit and not in the discharge of any duty to the seller; the use of the word "negligence" in such a connection is entirely misplaced, it should be reserved for cases of want of due care where some duty is owed by one person to another. No evidence was tendered of the existence of any such duty upon the part of buyers of hemp. In so far as there was any evidence upon the point it was given by a buyer called as a witness for the plaintiffs who said he had marked the word "tow" on his catalogue when at the show-rooms "for his own protection." I ought probably to have refused to leave the seventh question to the jury; but neither my complaisance nor their answer can create a duty. In my view it is clear that the finding of the jury upon the sixth question prevents the plaintiffs from being able to insist upon a contract by estoppel. Such a contract cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause, the mistake.

I am therefore of opinion that judgment should be entered for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Norton, Rose, Barrington & Co.*

Solicitors for defendants: *Rehder & Higgs.*

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GOVERNORS OF STEPNEY AND BOW EDUCATIONAL
FOUNDATION v. COMMISSIONERS OF INLAND
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Revenue—Reversion Duty—Benefit accruing to the Lessor—Basis of Ascertainment of—Building Agreement—Expenditure on Building—"Payments made in consideration of the lease"—Whether Ground Rent a "nominal rent"—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13.

Where under a building agreement a builder agrees with the owner of land to erect houses thereon and to expend in so doing not less than a certain specified sum in consideration of a lease thereof being granted to him on completion of the houses, the sum so expended on their erection is not a "payment made in consideration of the lease" within the meaning of s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, and cannot be taken into consideration for the purpose of ascertaining the total value of the land at the time of the original grant of the lease.

The fact that the rent reserved under a lease is only a ground rent and does not represent the full value of the land and the buildings on it does not constitute it a "nominal rent" within the meaning of that sub-section. That expression as there used means a sum paid by way only of an acknowledgment of the lessor's title without any relation to the value of the premises demised.

APPEAL from a referee under s. 33 of the Finance (1909-10) Act, 1910.

On April 24, 1822, one William Ford entered into an agreement with the trustees of Prisca Coborn's Charity to build at a minimum cost of 1500*l.* before March 25, 1823, four dwelling-houses (now known as 1, 2, 3, and 4, Coborn Street) on certain land at Bow in consideration of the granting by them of a lease of the said land for the term of ninety-four years from March 25, 1822, at a rent of 16*l.* per annum.

On September 2, 1822, the said William Ford entered into a further agreement with the said trustees to build at a minimum cost of 750*l.* two dwelling-houses (now known as 5 and 6, Coborn Street) on certain other land at Bow before December 25, 1823, in consideration of the granting by them of a lease of the said land for the term of ninety-four and a half years from September 29, 1822, at a rent of 8*l.* per annum.

The said trustees by an indenture of lease dated January 26, 1824, and made between the said trustees of the one part and

the said William Ford of the other part, leased the said plots of land and the said six houses in Coborn Street to William Ford for the term of ninety-four and a half years from September 29, 1822, at a rent of 24*l.* per annum "in consideration of the expense that the said William Ford hath been at in erecting the messuages hereby demised and of the rent and covenants hereafter reserved and contained on the part of the said William Ford his executors administrators and assigns."

At some date prior to November 18, 1886, the said William Ford erected a messuage now called Coborn Lodge partly upon ground held under the above mentioned lease of January 26, 1824, and partly upon certain other land leased to the said William Ford by the said trustees under a lease dated April 29, 1822.

By an indenture dated November 18, 1886, the trustees of the will of William Ford assigned unto one Lewis Levy the property known as Coborn Lodge and the properties known as Nos. 1, 2, 3, 4, 5, and 6, Coborn Street. The interest of the trustees of Prisca Coborn's Charity in the said premises became ultimately vested in the appellants. On May 13, 1910, Lewis Levy surrendered the said premises to the appellants, and thereupon if there was any benefit accruing to them from the determination of the lease reversion duty became payable by them under s. 13 of the Finance (1909-10) Act, 1910. (1)

In the account rendered by the appellants in respect of the

(1) By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

Sub-s. 2: "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which

the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation) of the land at the time the lease determines . . . exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)."

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said premises they returned the total value of the land at the time of the original grant at the sum of 3341*l.* and the total value of the land at the determination of the lease at the sum of 3150*l.*, and claimed that there was no benefit accruing to the lessors by reason of its determination on which reversion duty could be charged. The respondents estimated the total value of the land at the time of the original grant of the lease at the sum of 525*l.* and the total value of the land at the determination of the lease at the sum of 2716*l.*, and they assessed the reversion duty payable at 167*l.* 6*s.* 4*d.*

The appellants appealed against the said assessment to a referee appointed under s. 33 of the said Act, upon the ground that the respondents had when computing the total value of the land on January 26, 1824, wrongly omitted to take into consideration the amounts expended by the lessee prior to the grant of the lease in erecting the six houses mentioned therein. The referee dismissed the appeal, and the appellants appealed to the High Court.

Cave, K.C., and *J. E. G. de Montmorency*, for the appellants. The provision in s. 13, sub-s. 2, that the total value of the land at the time of the grant is "to be ascertained on the basis of the rent reserved and payments made in consideration of the lease" &c. was not intended to exclude any other method of ascertaining the value that may be open to the parties, but as that point has already been decided by this Court in *Ramsden v. Commissioners of Inland Revenue* (1) against the appellants' contention, it is not open to them to argue it here, and they only take it for the purpose of reserving their right to discuss it in the Court of Appeal. Secondly, the expenditure on building the six houses which was a condition of the granting of the lease was a "payment made in consideration of the lease" within the meaning of the section. The section does not say "payments made to the lessor"; so to construe it would require the reading in of words not there. It is enough if the payments were made to the builder's contractors, or indeed to any person provided they were made in consideration of the lease. Suppose the

(1) See note at end of report.

building agreement had provided that the lessor should build the houses and that on the granting of the lease the lessee should by way of a premium on the lease recoup him the expense which he had incurred by reason of the building, it could not be disputed that the payment of the cost of building in that case would be a "payment made in consideration of the lease" within the section. But what substantial distinction can be drawn between that case and the case before the Court? The practical result of the two is precisely the same. Thirdly, even if the words "payments made in consideration of the lease" do not *prima facie* include expenditure on building in pursuance of a covenant in the building agreement, it is expressly provided by the section that they shall do so in cases in which "a nominal rent only has been reserved," and here the rent reserved of 24*l.* for the six houses was a "nominal rent." That expression must not be understood as confined to a peppercorn rent; it includes any rent which is less than the true rack rent of the land with the buildings on it. In s. 8, sub-s. 2, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), a nominal rent is distinguished from a peppercorn rent. It speaks of "a peppercorn rent or a nominal or other rent less than the rent ultimately payable," shewing that a nominal rent is one form of rent less than the rent ultimately payable.

Sir John Simon, S.-G., and Tomlin, for the respondents. The money expended by the lessee in building in pursuance of his agreement was not a "payment made in consideration of the lease." To satisfy those words the payment must have been made to the lessor in cash and at the time of the lease. This was the view taken by Cozens-Hardy M.R. in *Inland Revenue Commissioners v. Anglesey (Marquess)* (1), where he says that for the purposes of the section the value was to be ascertained "on the basis of the rent reserved and payment made in consideration of the lease at the time when the lease was originally granted." Those latter words are apt to include a premium, but they cannot include a payment made before the date of the lease in pursuance of the earlier building agreement. If "payments made" are to be held *prima facie* to include the value of an undertaking to erect

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(1) Ante, 62, at p. 69.

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buildings the words of the section which are in brackets are altogether superfluous. Secondly, the appellants cannot pray in aid the paragraph in brackets, for a ground rent of 24*l.* is not a nominal rent in the sense in which the words are there used. It is contended on the other side that the words "nominal rent" include any rent however substantial which is less than the full or real rent. But the words of the section immediately preceding the brackets, "the rent reserved and payments made in consideration of the lease," directly negative that view, for they presume that the rent reserved may be less than the full rent and may require to be supplemented by some payments to bring it up to the full rent, while the words "nominal rent" are used in contradistinction to the "rent reserved." If the words meant only something less than the full rent the words "in cases where a nominal rent only has been reserved" might just as well have been omitted, for in every case in which the consideration of the lease consisted in part of a covenant to spend money on building the rent reserved would be less than the full rent of the premises. A nominal rent is a rent which is intended only as an acknowledgment of the lessor's ownership, as a symbol having no money value. The test of whether a rent is nominal or not is whether it is capable of capitalization. The object of the provision that the value should be ascertained on the basis of the rent and premium (if any) was to get over the difficulty inherent in an inquiry into the value of premises a hundred years or more ago, and to substitute for such an inquiry the simple arithmetical process of taking so many years' purchase of the rent reserved and adding to the product the premium if any; as to the result of which there could be no dispute, the amount of both rent and premium appearing on the face of the documents. This was the plan to be adopted wherever feasible. Where, however, the only rent reserved was a peppercorn or nominal rent which was incapable of capitalization the Legislature pointed out that the evidence of value must be sought for elsewhere, and in that case, and in that case only, the value of a covenant to erect buildings might be taken into consideration.

Cave, K.C., in reply. The appellants' contention as to the meaning of the words "payments made" does not, as asserted

by the other side, render the words in brackets superfluous. The word "payment" refers to a past transaction; it imports that the money has already been paid at the time of the execution of the lease. It does not include a promise to pay in futuro. Therefore, although expenditure on buildings already incurred was included in the words "payments made," it was necessary to insert the words in brackets to cover future expenditure on building. The suggestion that the test of a rent being only nominal is whether it has a money value capable of capitalization leads to strange conclusions. If the rent reserved in respect of land worth 100*l.* a year be a peppercorn the value of the expenditure on buildings may be taken into consideration, whereas if the rent reserved be five shillings it may not. No doubt, as pointed out by the Solicitor-General, the difficulty of ascertaining what was the value of land a hundred years ago may be very great, but, considering that the value to be ascertained, for the purpose of comparison with the value of the premises on the determination of the lease, is the value to the lessor, not the value to the tenant, the Legislature have adopted a strange way of surmounting that difficulty, if they have arbitrarily fixed as the sole basis of value the sum which the tenant paid, in spite of the fact that that sum may have had no relation whatever to the real benefit that the lessor received.

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July 2. HORRIDGE J. This case raises a question as to the basis on which for the purposes of reversion duty the total value of land, partly included in a lease dated January 26, 1824, from the predecessors in title of the appellants to one William Ford, and partly included in a lease dated April 29, 1822, from such predecessors in title to the said William Ford, is to be ascertained at the time of the original grant of the leases. Coborn Lodge, a portion of the property in question, was erected partly on the land leased on January 26, 1824, and partly on land included in the lease of April 29, 1822, but no question was raised before me as to the value of Coborn Lodge, the sole question being with regard to the properties Nos. 1 to 6, Coborn Street included in the

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lease of January 26, 1824, and which with Coborn Lodge formed the subject of the assessment.

By an agreement dated April 24, 1822, the predecessors in title of the appellants, in consideration of the charges which William Ford would be at in erecting, building, and finishing the messuages or dwelling-houses therein mentioned and of the rents and covenants therein agreed on the part of William Ford to be paid and performed, agreed to demise to the said William Ford his executors, administrators, and assigns, the land upon which Nos. 1, 2, 3, and 4, Coborn Street were erected for a term of ninety-four years from March 25, 1822, at a rent of a peppercorn for the first year of the said term and at the yearly rent of 16*l.* for the remainder of the said term, and the said William Ford agreed that he would before March 25, 1823, erect, build, and completely finish fit for habitation four brick messuages or dwelling-houses as therein described and should expend at least the sum of 1500*l.*

By an agreement dated September 2, 1822, the predecessors in title of the appellants, in consideration of the charges which William Ford would be at in erecting, building, and finishing the messuages or dwelling-houses therein mentioned and of the rents and covenants therein agreed on the part of the said William Ford to be paid and performed, agreed to demise to the said William Ford, his executors, administrators, and assigns, the land upon which Nos. 5 and 6, Coborn Street were erected for a term of ninety-four and a half years from September 29, 1822, at the rent of a peppercorn for the first year of the said term and at the yearly rent of 8*l.* for the remainder of the said term, and the said William Ford agreed that he would before December 25, 1823, erect, build, and completely finish fit for habitation two brick messuages or dwelling-houses as therein described and should expend at the least the sum of 750*l.*

By an indenture of lease dated January 26, 1824, and made between the predecessors in title of the appellants and William Ford, it was witnessed that, in consideration of the expense which the said William Ford had been at in erecting the messuages thereby demised and of the rents and covenants therein reserved and contained on the part of the said William Ford, they the said

predecessors in title of the appellants demised and leased unto the said William Ford the two parcels of land comprised in the agreements of April 24 and September 2, 1822, with the six houses erected and built thereon, being Nos. 1 to 6, Coborn Street, for a term of ninety-four and a half years from September 29, 1822, at the yearly rent of 24*l*. In May, 1910, the lease was surrendered by a transferee from Ford, and the reversion became vested in the appellants. The question therefore before me is on what basis the total value of the land and houses forming a portion of the subject of the assessment ought to be ascertained at the time of the granting of the lease of January 26, 1824.

The first point taken before me was that the provisions of s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910, with regard to the ascertainment of the total value of land at the time of the original granting of the lease were not exclusive, and that the appellants were entitled to give evidence of what was the real value at the time of the original grant apart from the provisions of that section. It was not disputed that the point was dealt with by me in the case of *Ramsden v. Commissioners of Inland Revenue* (1), in which I held that this provision formed an exclusive mode of ascertaining the value. I think the passage in the judgment of the Master of the Rolls in the case of *Inland Revenue Commissioners v. Anglesey (Marquess)* (2), of which I have been supplied with a shorthand note, points to this being the right view when dealing with the total value of the land at the date of the original grant of the lease. The passage is as follows: "That is not to be ascertained on the principle of the total value found in s. 25, but on the basis of the rent reserved and payment made in consideration of the lease at the time when the lease was originally granted." I therefore hold that I am bound to apply the principles prescribed in s. 13, sub-s. 2, to the ascertainment of the total value of the land at the time of the granting of the lease.

The second point taken was that on the wording of s. 13, sub-s. 2, the sums of 1500*l*. and 750*l*. were payments made in consideration of the lease and should be added to the capitalized value of the rent reserved, which had not been done by the

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(1) See note at end of report.

(2) Ante, 62, at p. 69.

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Commissioners in this case, whose decision had been affirmed by the referee. On behalf of the Crown it was contended that the payments made in consideration of the lease were confined to payments of the same nature as a premium or fine on the granting of a lease, which payment would go into the pocket of the lessor. Mr. Cave on behalf of the appellants contended before me that this meant inserting into the section after the words "payments made" the words "to the lessor" which were not there. It seems to me that the true view of the expenditure of 1500*l.* and 750*l.* was that it was an expenditure made by a prospective lessee for the purpose of building houses of which he was to have the enjoyment for ninety-four and a half years and that the benefit which the landlord obtained was the reversion in the houses at the end of ninety-four and a half years together with the advantage of having the rent of the land further secured. The advantage obtained by the landlord does not seem to me to be in the nature of a payment which he was in a position to demand or obtain in respect of his land, but what he did get was the benefit which I have mentioned. I think it would be stretching the words of the section to treat an expenditure on the land as a payment made in consideration of the lease. It is an expenditure on the land from which the proposed tenant himself obtains a considerable benefit.

The third contention before me was that the rent of 24*l.* was a nominal rent, and that the undertaking to erect buildings and to expend moneys contained in the agreements of April 24, 1822, and September 2, 1822, constitute, within the words in brackets in s. 13, sub-s. 2, covenants or undertakings to erect buildings and to expend any sums of money upon the property the value of which ought to be added in ascertaining the value of the land at the time of granting the lease. In my view the undertakings on the part of Ford contained in those agreements were undertakings to erect buildings and to expend moneys in consideration of the lease. But that leaves the question of whether or not the rent of 24*l.* was a nominal rent, because the value of such undertaking is only to be added where the rent is a nominal one. The 24*l.* clearly was not, and was not contended by the Solicitor-General to be, the full rent of the land and buildings included in the lease. On

behalf of the appellants it was contended that nominal rent means rent which was not the full value of the land and buildings at the time of the granting of the lease. On behalf of the Crown it was contended that it means rent which was a mere token or acknowledgment of the relation of landlord and tenant, and should be read in the same sense as that in which it is used in the phrase "nominal damages." It seems to me that the object of the procedure prescribed by s. 13, sub-s. 2, for the purpose of ascertaining the total value of the land at the time of the original granting of the lease was to simplify the mode of ascertainment. In many cases, as in this case, if the inquiry was as to actual value at the time it would be necessary to enter into an inquiry which would be extremely difficult if not impossible to carry out after a lapse of a great number of years. If the test of whether or not the rent represents the full value of the property is to be applied, a similar inquiry would have to be entered upon as to the value of property at a remote period, and I think it would be impossible to limit it, as Mr. Cave suggested, to cases where from the documents it could be seen that the rent was in the nature of mere ground rent or not the full rental value. It is much easier to ascertain from the facts of the case whether or not the rental was a mere acknowledgment of tenancy. I think the true view is that, for the purpose of simplifying the mode of ascertainment, the test of whether or not covenants or undertakings were to be brought into account is whether or not the lessor obtained what I may call a real rent, or whether he merely got an acknowledgment of his rights as landlord, and it was not intended to enter into an inquiry as to whether the actual rent was adequate or not. I think the question is an extremely difficult one, but in my view nominal rent means what I have said, and the 24*l.* which was to be paid in this case can in no sense be called a nominal rent. I therefore think that the judgment of the referee is right and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants : *Wickings, Smith & Son.*

Solicitor for respondents : *Solicitor of Inland Revenue.*

J. F. C.

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PETITION OF APPEAL against the decision of the Commissioners of Inland Revenue as to the assessment of reversion duty under s. 13 of the Finance (1909-10) Act, 1910.

Upon the determination of a leasehold interest, under an indenture dated April 26, 1867, by a surrender on October 8, 1910, the Commissioners estimated the value of the benefit accruing to the appellant at the sum of 501*l.*, and, taking into account the provisions of sub-s. 2 of s. 3 of the Revenue Act, 1911, they assessed the duty payable at 7*l.* 12*s.* 2*d.* The appellant appealed in accordance with the provisions of s. 33 of the Act of 1910, and the referee affirmed the determination of the Commissioners. The appellant appealed to the High Court.

Danckwerts, K.C., Spence, and A. C. Nesbitt, for the appellant.
Sir John Simon, S.-G., and Austen-Cartmell, for the respondents.
The facts and arguments appear fully in the judgment.

Cur. adv. vult.

1912. Dec. 12. (1) HORRIDGE J. This is a petition of appeal by John Frederick Ramsden, who is now owner in fee of the property mentioned in the petition, namely, the premises No. 9453 Huddersfield, forming part of what is known as the Ramsden Estate, against an assessment for reversion duty under s. 13, sub-s. 2, of the Finance (1909-10) Act, 1910.

The facts with regard to this property depend upon the admissions of fact, the statement of facts contained in certain passages of the speech of Lord Cranworth in the case of *Ramsden v. Dyson* (2), and in the recital to the Act of Parliament, the Ramsden Estates Leasing Act, 1859; all which matters are made *prima facie* evidence by an Order dated June 26, 1912. Further, in the course of the argument it was admitted by the Solicitor-General that the facts in this case as regards Milnes may be taken as the same as in *Thornton's Case in Ramsden v. Dyson*. (2)*

Shortly, the facts are as follows. On March 17, 1849, one Milnes applied for the land in question to hold as tenant at will, under an understanding that he should build upon it, and he was let into possession at a yearly rent of 1*l.* 7*s.*, and was entered in the books of the estate in respect of his occupation, and in fact built the present premises in the years 1849-50. In March, 1852, after an intermediate occupation, the occupation of the premises passed to Joseph Oddy and Martha Smith as joint tenants. On August 13, 1859, the Ramsden Estates Leasing Act, 1859, was passed, to which I shall have occasion to refer later, and, in pursuance of the powers granted by that Act, a lease for ninety-nine years was granted to Daniel Calverley, at a rental of 1*l.* 16*s.* 8*d.* This lease was determined by surrender on October 8, 1910. Such surrender was made in pursuance of an agreement for the grant of a

(1) The judgment was written.

(2) (1866) L. R. 1 H. L. 129.

new lease for 999 years to the surrenderors; which new lease was accordingly granted by indenture dated October 9, 1910, at a yearly rent of 3*l.* 13*s.* 4*d.*

There is no dispute that the total value of the land at the time when the lease determined, as found by the Commissioners, namely, 541*l.* 13*s.* 4*d.*, is correct; and the contention of the appellant is that the total value of the land at the time of the original grant of the lease has been ascertained on a wrong basis. It seems to me it is quite clear that the original occupier, Milnes, was let into possession upon the understanding that buildings should be erected, as was the case in *Thornton's Case*, referred to in *Ramsden v. Dyson* (1); and that he entered upon the land and built, within the words of the recital to the Act of Parliament (which is made *prima facie* evidence), "in the expectation only of not being disturbed in his possession." The basis upon which the referee has decided that the total value of the land at the time of the lease to Calverley is to be estimated is the basis of taking into account only the rent reserved. I allowed the appellant to amend his contentions by adding further contentions, which were the main ones relied upon before me. The first of such contentions was that the undertaking to build which existed when Milnes entered into possession is to be considered and taken as part of the basis under s. 13, sub-s. 2. The words of that sub-section are as follows: "the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property)." In other words, the contention was that the fact of buildings having been erected under the circumstances above mentioned was a portion of the consideration for the granting of the lease to Calverley, and came within the words in brackets in the section, as being a covenant or undertaking to erect buildings or to expend any sums upon the property. The position at the moment seems to me to have been as follows. There was, under the Act of Parliament, no obligation on the part of the then lessor to grant the lease; and the Act had merely been passed enabling him to do so if he thought fit. The occupier had no legal rights as against the landlord in respect of these buildings which had been erected on the landlord's land. I cannot find any facts in this case to place the obligation of the landlord with regard to these buildings any higher than the facts in *Thornton's Case* (2), which appear in the speech of Lord Cranworth; and in that case it was held that a tenant had no further rights in the property than a tenant from year to year. I will refer later in my judgment to the passage in Lord Cranworth's speech which seems to me to make this clear. The landlord was in the position of granting a new lease of land then only subject to a yearly tenancy, and upon which buildings had already been erected, and there was no covenant or undertaking to erect buildings in any way which formed any portion of, or was in any way connected with, the transaction of leasing. I, therefore, do not think that, even assuming the words "nominal rent" in the section were complied with, upon which I express no opinion as it is not necessary for my decision, the appellant has

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(1) L. R. 1 H. L. 129.

(2) *Ibid.* at pp. 137, 139.

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in any way brought himself within the words in brackets in the section, so as to entitle him on this ground to any addition to the value at the time of the lease. It was contended before me that this is similar to a lease granted in pursuance of a building contract; but, whether or not that case is within the words in brackets in sub-s. 2, it is not this case, as there the lease is only a portion of a larger agreement; and clearly the consideration of contracting to build can be said to be what to some extent induced the lessor to agree to give a lease.

The second contention put before me was that the surrender of such right as Calverley had when the lease was granted to him in 1867 must be taken as part of the basis under sub-s. 2 as being a payment made or consideration given for Calverley's lease. I think, in any view of the word "payment," this question depends upon whether or not Calverley had any right to give up other than his yearly tenancy, which was replaced by the lease for a longer period. It was put to me that, under the recital in the Act, I must take it that he had an expectation of not being disturbed in his possession; but on this point I think the language of Lord Cranworth (1) shews the true position: "The appellants say, it must be interpreted as meaning only that though the right conferred was that of a mere tenant at will or tenant from year to year, yet so long as the ground rent was duly paid there was no intention to disturb the tenants in their possession, and that they might thus safely allow the matter to rest in the honour of the Ramsden family. If this latter be the true construction, it is clear that, even if such statements as are attributed to Joseph Brook had been made by Sir John himself, the persons taking the land would have acquired no right, legal or equitable, beyond that of a mere tenant from year to year. If any one makes an assurance to another, with or without consideration, that he will do or will abstain from doing a particular act, but he refuses to bind himself, and says that for the performance of what he has promised the person to whom the promise has been made must rely on the honour of the person who has made it, this excludes the jurisdiction of Courts of Equity no less than of Courts of Law. The important question, therefore, is, which of these two constructions is the correct one? I have no hesitation in saying that, in my opinion, that of the appellant is the true construction." At the time these observations were made the Act of Parliament was in existence containing the recital now relied upon. I do not think I can hold that Calverley had any legal right beyond that of a yearly tenant; and upon this basis, in my judgment, there was nothing except rent given as consideration for the lease. If I am right in this, it is not necessary to decide whether any such release of a right would come within the word "payment"; but I do not think it would, as the word "payment" clearly does not include all value, because the case of a covenant or undertaking to erect buildings is expressly mentioned within the words included in the brackets; and I think the word "payments" means payments in the narrow and ordinary sense of the term.

A further contention was raised before me that the provision as to the mode of ascertaining the total value of the land at the time of the original

(1) L. R. 1 H. L. at p. 145.

grant of the lease was not an exclusive provision, and that other methods of ascertaining might be resorted to; but, in my view, the section, in using the words "to be ascertained," is compulsory, and this is the only way in which the total value at the time of the granting of the lease is to be ascertained. In my view, the principle upon which the referee has gone is right; and this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Capel-Cure & Ball.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. H. W.

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DRUMMOND, APPELLANT *v.* COLLINS (SURVEYOR OF TAXES),
RESPONDENT.

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*Revenue—Income Tax—Foreign Possessions—Property settled on Infants—
Infants not entitled to a Vested Interest—Provision for Maintenance and
Education—"Uncontrolled Discretion" of Trustees—Sums remitted to
Guardian in United Kingdom for Maintenance and Education—Income
Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, case 5—Income Tax Act, 1853
(16 & 17 Vict. c. 34), s. 2, Sched. D.*

A foreigner resident abroad by his will gave his property, which was situate abroad, to trustees upon trust for his deceased son's children, who were minors, there being a provision that the trustees should accumulate the income of the respective shares of the children and add the accumulations to capital until the children should respectively attain the age of twenty-five years, and no child should have any vested interest during the continuance of the trust. The will contained a direction to the trustees, out of the net income of the proportionate share of the trust estate held in trust for any such child, to make provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child. The trustees from time to time remitted to the mother of the children, who was their guardian and who was residing with them in England, sums of money in accordance with the provisions of the will for the maintenance and education of the children:—

Held, that the moneys so remitted were assessable to income tax under s. 100, case 5, of the Income Tax Act, 1842, Sched. D, as being moneys received in this country in respect of foreign possessions or as being moneys which were in themselves foreign possessions.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Daventry in the county of Northampton.

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1. At a meeting of the Commissioners on October 18, 1911, Mrs. Albertine Drummond, the appellant (previously Mrs. Albertine Field), appealed against an assessment in the sum of 10,000*l.* for the year ending April 5, 1908, in respect of remittances from foreign possessions and made under s. 100, case 5, of the Income Tax Act, 1842 (1), and s. 2, Sched. D, of the Income Tax Act, 1853.

2. The appellant in 1890 married the late Mr. Marshall Field, junior, who died in November, 1905, and by whom she had three children, Marshall, Henry, and Gwenderlyn, who are minors under the age of twenty-one years and to whom she is guardian. In September, 1908, she married Mr. Maldwin Drummond, of 4, Down Street, Piccadilly, in the county of Middlesex, who is still living.

3. The appellant's late husband, Mr. Marshall Field, junior, was the son of the late Mr. Marshall Field, of Chicago, who died in January, 1906, having by will dated June 14, 1904, made certain provision for his son, and on the death of his son for his son's widow and their children.

4. The material clauses of this will as affecting the children of the appellant are as follows:—

Seventh. "After the death of my son, if he shall die leaving

(1) 5 & 6 Vict. c. 35, s. 100, case 5, applicable to Sched. D: "The duty to be charged in respect of possessions . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain and arising from property which shall not have been imported into Great Britain, or from money or value so

received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 5, the term "Great Britain" in the Income Tax Act, 1842, shall be read as meaning the United Kingdom.

Sched. D is contained in s. 2 of the Income Tax Act, 1853, but by s. 5 the duties are to be assessed under the regulations and provisions of the Income Tax Act, 1842.

any child or children or issue of a child or children him surviving, I direct said trustees to hold the trust estate and to apply the net income and ultimately the capital as hereinafter provided for the use and benefit of all the children of my son surviving him, and for the use and benefit of the issue of any child or children that may have died, said issue taking a parent's share per stirpes. It is my will that in such case the trust estate and the income thereof shall be so held, administered, and applied by said trustees that each of my grandsons Marshall Field and Henry Field, now living, or their respective issue shall respectively receive a double portion, that is, twice as much as any other child, or issue thereof, of my son, and that any other surviving children of my son, and their issue per stirpes, shall receive equal shares. Out of the net income of the proportionate share of the trust estate held in trust for any child of my son, or issue of a child, I direct that said trustees make such provision from time to time as they in their uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of such child, or issue thereof, until such child or issue thereof shall be entitled under provisions hereinafter contained to receive payments of income directly from said trustees. Such provision shall be paid over by said trustees from time to time to each such child or issue thereof, or to the guardian or guardians of each child or issue thereof, or may be otherwise applied for the benefit of each such child or issue thereof as said trustees may think desirable. If and so far as the suitable maintenance or education of any such child or issue thereof shall from time to time appear to said trustees to be sufficiently provided for in other ways or from other sources said trustees shall refrain from making any provision therefor out of said trust estate.

"In the cases respectively of my son's three children, now living, Marshall and Henry and Gwenderlyn, said trustees shall, upon the death of my son and subject to the above directions respecting provision for maintenance and education, retain and hold all the net income of their respective shares of the trust estate and invest and reinvest the same for accumulation, and add the accumulations of income to the capital of their said

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shares respectively, until my said three grandchildren shall respectively attain the age of twenty-five (25) years. From and after the time when they shall respectively attain the age of twenty-five (25) years said trustees shall pay over to them in regular quarterly instalments during their lives for their own use one half ($\frac{1}{2}$) of the net income of their respective shares of the entire trust estate enhanced by accumulations added thereto as herein directed, and the other one half ($\frac{1}{2}$) of the net income of their respective shares of the entire trust estate said trustees shall retain and hold and shall invest and reinvest for accumulation, adding the accumulations of income to the capital of their respective shares, until my said three grandchildren shall respectively attain the age of thirty-five (35) years. Thereafter from the time when they shall respectively attain the age of thirty-five (35) years said trustees shall pay over to them in regular quarterly instalments during their respective lives, for their own use, all the net income of their respective shares of the entire trust estate."

Twenty-second. "I direct that no title or interest in any of the several trust funds in my will created or in the money or other property composing them or any of them or in the income accruing thereon or in its accumulations shall vest in any beneficiary under any such trust during the continuance of the trust; nor shall any beneficiary acquire any right in or title to any instalments or instalment of income otherwise than by or through the actual payment of each instalment respectively by the trustee or trustees of the respective trust estates and the receipt thereof in each case by the beneficiary, nor shall any beneficiary have any right or power by draft assignment or otherwise to anticipate or to mortgage or otherwise encumber in advance any instalments or instalment of income, nor to give orders in advance upon the trustees or trustee for any instalments or instalment of income."

5. After the death of her late husband, the said Mr. Marshall Field, junior, the appellant resided in America until the beginning of April, 1906, when she left that country with her three children, who always resided with her, and arrived in London at the end of April, 1906, and resided for a short time at

Claridge's and other hotels there. Subsequently she travelled for a time in the United Kingdom until September 30, 1906, from which date until Christmas, 1906, she rented and resided in a furnished house at Ashby St. Ledgers, in the county of Northampton. From Christmas, 1906, until July, 1907, she resided abroad.

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6. In July, 1907, the appellant took a lease of Danesbury House, Welwyn, Herts, and resided there until April 5, 1908.

7. The appellant received remittances of income in respect of her personal estate abroad amounting to the sum of 274*l.*, and liability to be assessed for the year ending April 5, 1908, and to pay income tax in respect of such remittances was admitted, and no question for the consideration of the Court arises in respect thereof.

8. It was also admitted by the appellant that considerable remittances—the subject of the present assessment—had been received by her from America from the trustees of the estate of the late Mr. Marshall Field in accordance with the provisions of the above mentioned will for the education and maintenance of her said three children, but she declined to state the amount of the said remittances on the ground that, as she contended, there was no liability to assessment in respect thereof, and she produced a letter written by the said trustees dated April 14, 1911, which was in the following terms:—

“ Illinois Trust and Savings Bank,

“ Chicago,

“ April 14th, 1911.

“ Trust Department.

“ Mrs. Albertine Drummond,

“ Chicago, Illinois.

“ Dear Madam,

“ We have carefully considered your request for a statement of the amount of moneys advanced to you by us as trustees under the seventh article of the will of Marshall Field deceased during the last five years and in reply we beg to state:—

“ We hold as trustees under said will a fund the income on which belongs to us as trustees. We are empowered by the will to make such provision from time to time as we in our

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uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of your children who are the grandchildren of the said Marshall Field.

"We are expressly empowered to make such provision in such way as we may think desirable. We have chosen to forward to you from time to time funds held by us under this article for application by you for the suitable maintenance and education of your children. These funds thus advanced to you we have intended should be used by you for that purpose.

"The funds so advanced are in no sense income payable to you under the terms of said will. Continuance of such payment to you is not demanded by the will, but it is open to us to consider any other method of providing for the maintenance and education of the children we may think desirable.

"We object to the diminution of the fund by the payment of any income tax levied upon the theory that the moneys so advanced to you are, in a legal sense, income payable to you. If such diminution should occur we should be led to consider some other method of caring for the question of the maintenance and education of the children.

"We understand that you desire the report which you have requested in connection with the demand upon you for the payment of an income tax on this fund. For the reasons stated we must decline to furnish you the statement which you request.

"We think that an accurate statement of the character of the advances made by us should demonstrate that the advances so made are not in any sense income payable to you, and that such statement should dispose of any such question.

"Yours truly,

"Illinois Trust and Savings Bank,

"By William H. Henkle,

"Secretary.

"Chauncey Keep }
"Arthur B. Jones } Trustees."

9. It was contended on behalf of the appellant: That on the facts proved and on the true construction of the said will and of the said statutes the fund held by the trustees was not wholly or

in part a foreign possession of the appellant and/or of her children or any of them; that the mere exercise by the trustees of their discretion in remitting certain of the moneys accruing to them from such fund or part of it did not in law operate to transform such fund or any part of it into a foreign possession of the appellant and/or of her said children or any of them, and did not render or constitute the said remitted sums a property or concern of the said infants, and the mere exercise of the discretion by the trustees in remitting such sums to the appellant did not constitute her a guardian of the property and concern of the said infants; and that on the facts proved and on the true construction of the said will and of the said statutes the said remittances were in the nature of voluntary payments.

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10. The surveyor contended on behalf of the Crown:—

(a) That as by the provisions of the will of the late Marshall Field the trustees are directed to make provision for the suitable maintenance and education of his grandchildren, the trustees, notwithstanding the “uncontrolled discretion” clause, had no option but to make such payments, seeing that they must be regarded as being in the opinion of the trustees “necessary or advisable for the suitable maintenance and education” of the children, and that the children were not, in their opinion, otherwise sufficiently provided for.

(b) That the payments were not voluntary allowances, as contended by the appellant, but were remittances of income to which the grandchildren of the testator were legally entitled under the provisions of their grandfather's will.

(c) That the appellant as guardian of the testator's grandchildren was correctly assessed in respect of the said remittances under the provisions of s. 41 of the Income Tax Act, 1842.

11. The Commissioners after hearing and fully considering the evidence and arguments found: That the appellant received certain remittances amounting to the sum of 274*l.* in her own right, and further remittances, the amount of which was not disclosed, as guardian of her said three children under the provisions of the will of their grandfather, the late Mr. Marshall Field, and held that she was liable to be assessed in respect of the said remittances, and they confirmed the assessment accordingly.

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No question arises in this case as to the form of the assessment. The sole question for the consideration of the Court is whether the appellant is liable to be assessed as guardian of her children in respect of the remittances made to her under the provisions of the will of the late Mr. Marshall Field. If the question is answered in the negative and in favour of the appellant, it is agreed that the assessment is to be reduced to the sum of 274*l.* as representing the amount of the remittance which she received in her own right; and if the question is answered in the affirmative and in favour of the Crown, the case is to be referred back to the Commissioners to ascertain the amount of the remittances in question, and to adjust the amount of the assessment accordingly.

Sir Alfred Cripps, K.C. (*G. A. Scott* with him), for the appellant. The moneys remitted by the trustees of the will from America to this country for the maintenance and education of the grandchildren of the testator are not taxable as having been received in this country from foreign possessions within s. 100, case 5, of the Income Tax Act, 1842, Sched. D. The question must be looked at as if the money had been remitted to the grandchildren direct, the guardian being merely a convenient person to whom to pay the money on their behalf. The grandchildren had no "foreign possessions" in America. No part of the estate under the will of their grandfather vested in any grandchild until he or she attained the age of twenty-five years. There was no direction in the will to the trustees to pay anything for the maintenance or education of the children; there was merely a power "in their uncontrolled discretion" to do so if they thought it right. The remittances made by the trustees were voluntary remittances; they were gifts by the trustees, and as such are not taxable, though no doubt sums of money, if received by reason of an office, such as Easter offerings or grants from a clergy fund, may be assessable under Sched. E: *Herbert v. McQuade* (1); *Blakiston v. Cooper* (2); *Turner v. Cuxon*. (3) The foreign possession must be one

(1) [1902] 2 K. B. 631.

(2) [1909] A. C. 104.

(3) (1888) 22 Q. B. D. 150.

to which the children are entitled, and here the children are not entitled to any property in America. There is no source of income for the children in America. The moneys, to be taxable, must be received as income under a legal right to receive it; otherwise a voluntary payment would be taxable. The children here had no income in that sense. The trustees might, if they had thought fit, have paid the amount of the bills for the children's maintenance and education in this country to the creditors direct, but instead of doing so they thought it more convenient to pay the money to the guardian with instructions to her to pay for the maintenance and education. The moneys remitted here would clearly not be taxable under case 5 in the former case, nor are they taxable in the latter case. It is really expenditure in this country by the trustees. If the trust were in this country the Court would not interfere with the bona fide exercise by the trustees of their "uncontrolled discretion": *Gisborne v. Gisborne* (1); *Tabor v. Brooks*. (2) In *Colquhoun v. Brooks* (3) Lord Herschell, at p. 508, and Lord Macnaghten, at p. 516, while saying that the word "possessions" was a very comprehensive word, said that the foreign possession must be a source of income. There is no source of income here to which the children are entitled. Nor can it be said that when once the trustees have exercised their discretion and remitted the moneys, the moneys so remitted are a foreign possession within case 5. If that were so, every voluntary payment, when made, would be subject to income tax. The decision of the Commissioners was therefore wrong. [*Di Sora v. Phillipps* (4) was also referred to.]

Sir John Simon, S.-G. (W. Finlay with him), for the respondent. As has already been said on behalf of the appellant, the position is the same as if the moneys had been paid direct to the beneficiaries, assuming them to have been of full age, payment to the guardian being mere machinery. The trust estate here is a foreign possession, and the moneys for the maintenance and education of the children were received in this country. The duty is payable under case 5 on "the full amount of the actual sums

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(1) (1877) 2 App. Cas. 300. (3) (1889) 14 App. Cas. 493.
(2) (1878) 10 Ch. D. 273. (4) (1863) 10 H. L. C. 624.

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annually received in Great Britain" (now the United Kingdom) For the purposes of income tax the beneficial interest is to be considered. Sect. 41, making the trustee, guardian, &c., in the case of an infant or married woman chargeable, carries this out. It is true that the beneficiaries here have not a vested interest in the property, but the moment the trustees of the will send the money to this country, then the sums so remitted are taxable. When once the discretion of the trustees is exercised, the money is taxable as being received from a foreign possession. Under Sched. D the duties extend to every description of property or profits not contained in either of the Schedules A, B, or C, and to every description of employment not contained in Sched. E, "and shall be charged annually on and paid by the persons . . . receiving or entitled unto the same." Case 5 deals with foreign possessions annually received in this country, and the duty is charged on the person receiving it, not on the trustee. It is not ad rem to say that the trustees need not have remitted the money; they did remit it, and when they did remit the position became exactly the same as if they were bound to remit. It is similar to the case of a trustee being under a duty to remit but with a discretion as to the amount of the remittance. In such a case clearly the amount actually remitted is taxable. The fund from which the money is remitted is a "foreign possession" within case 5. As Lord Herschell said in *Colquhoun v. Brooks* (1), "when therefore the term 'possessions' is employed it seems to indicate an intention to cover by it something more than 'property.'" As Lord Macnaghten said (2), "it is the widest and most comprehensive word that could be used." Under the will a definite share of the estate is held in trust for each of the children, and that share is the foreign possession of the infant, as he is beneficially entitled to it. That share is the fund from which the moneys remitted here are drawn. The will directed the trustees, "out of the net income of the proportionate share of the trust estate held in trust for any child of my son," to make such provision for maintenance and education as they in their uncontrolled discretion might think necessary or advisable. When

(1) 14 App. Cas. 493, at p. 508.

(2) Ibid. at p. 516.

that discretion was exercised and the moneys received here, the conditions of the Act applied and the moneys became taxable.

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[HORRIDGE J. Is not the money itself which is remitted a "foreign possession" ?]

It may be put in that way. The Act seems to regard a foreign possession and the receipt from a foreign possession as distinct, but it may be said that the moneys received here are foreign possessions. The decision of the Commissioners was therefore right.

Sir Alfred Cripps, K.C., in reply.

Cur. adv. vult.

July 30. HORRIDGE J. read the following judgment:—The question in this case is whether or not the appellant as the guardian of the infant children of Mr. Marshall Field, junior, deceased, is liable to pay income tax on certain moneys which have been remitted to her in England by the trustees of the will of the late Mr. Marshall Field of Chicago.

By that will it was directed that out of the net income of the proportionate share of the trust estate held in trust for any child of Mr. Marshall Field, junior, or issue of a child, the trustees should make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child or issue thereof, until such child or issue thereof should be entitled under provisions thereafter contained to receive payments of income directly from the said trustees, and that such provision should be paid over by the trustees from time to time to each such child or issue thereof, or to the guardian or guardians of each child or issue thereof, or might be otherwise applied for the benefit of each such child or issue thereof as the trustees might think desirable, and if and so far as the suitable maintenance or education of any such child or issue thereof should from time to time appear to the trustees to be sufficiently provided for in other ways or from other sources the trustees should refrain from making any provision therefor out of the trust estate. The income not so applied was to be accumulated on the trusts set out in paragraph 4 of the case.

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In paragraph 8 of the case it is stated that it was admitted by the appellant that considerable remittances, the subject of the present assessment, had been received by her from America from the trustees in accordance with the provisions of the will for the maintenance and education of her said three children.

By s. 2, Sched. D, of the Income Tax Act, 1853, a duty is imposed for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere. By the rule under Sched. D, contained in the Income Tax Act, 1842, duties are to be paid by the persons receiving or entitled unto the same, and by the fifth case to Sched. D of the same Act, under which case the Crown claims the duty in question, the duty is to be charged in respect of possessions in the British plantations in America or in any other of Her Majesty's dominions out of Great Britain and foreign possessions, and the duty to be charged is to be computed on a sum not less than the full amount of the actual sums annually received in Great Britain.

The appellant in this case is sought to be charged under s. 41 of the Income Tax Act, 1842, as the guardian of the infants for whose benefit the sums in question were remitted. For the appellant it was argued that the sums in question were merely voluntary payments, as the remitting of any sum whatever was entirely in the discretion of the trustees, and it was further argued that the trustees could have paid the bills for the maintenance and education of the children by remitting the money to pay such bills direct to England without paying it either to the children or to the guardian. As appears from the case of *Colquhoun v. Brooks* (1), in the opinion of Lord Macnaghten the word "possessions" is to be taken in the widest sense possible as denoting everything that the person has as a source of income.

One must consider the actual facts of the case, which were that the trustees had in fact exercised a discretion and had remitted moneys for the benefit of the three children for the

(1) 14 App. Cas. 493, at p. 516

purposes of their maintenance and education. It seems also to me to be clear from the rule and the fifth case of the Income Tax Act, 1842, Sched. D, that the person receiving moneys is a person to be charged.

I take the view that the proportionate shares of the trust estates held in trust for the children were, as to each of the children, a foreign possession, and that the sums remitted were sums actually received in respect of foreign possessions. If I am wrong in this I am further of opinion that whenever the discretion had been exercised, the moneys to be remitted, and which were in fact subsequently remitted, were in themselves foreign possessions in respect of which the full amounts were received in Great Britain.

For these reasons I am of opinion that the decision of the Commissioners was right, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Boodle, Hatfield & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

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[IN THE COURT OF APPEAL.]

EDWARDS v. WINGHAM AGRICULTURAL IMPLEMENT COMPANY, LIMITED.

Employer and Workman—Compensation—Course of the Employment—Bicycle provided by Employer—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.

In a claim under the Workmen's Compensation Act, 1906, by the dependants of a deceased workman, it appeared that he was employed as an engine driver and was paid by the hour, his work consisting in going round from farm to farm with an engine and threshing machine belonging to his employers, to do the threshing, to look after the interests of his employers, and solicit orders from farmers. For these purposes he was supplied by his employers with a bicycle to use in travelling between his work and his home and between the farms in his district. He also had to make up a daily sheet giving the name of the farmer using the machine, the number of hours worked, lost time, moves, and flagmen. He was not bound to use the bicycle, but the evidence shewed that the use of a bicycle was part of the arrangement and a term of the contract of engagement. On September 25, 1912, his work having ended at 6 p.m., he proceeded to go home on his bicycle. On the way home he came into collision with a motor lorry and sustained injuries from which he died the next day:—

Held, that the employment ended at 6 o'clock and it was not part of his duty to ride home on the bicycle, therefore the accident did not arise in the course of the employment.

Cremins v. Guest, Keen & Nettlefolds, Ltd. [1908] 1 K. B. 469, and *Mole v. Wadworth* (1913) W. C. & Ins. Rep. 160; 6 B. W. C. C. 128, distinguished.

APPEAL from an award of the judge of the Dover County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Herbert Edwards was a workman employed by the Wingham Agricultural Implement Company, Limited, for several years as an engine driver. He was paid by the hour at 6*d.* an hour, and his work consisted in going round from farm to farm with an engine and threshing machine belonging to the company, to do the threshing, to look after the interests of the company, and solicit orders from farmers. To enable him to do this he was supplied by the company with a bicycle on which to travel between farms and between his work and his home, which was

about six miles from the company's works. He also had to make up a daily sheet giving the name of the farmer using the machine, the number of hours worked, lost time, moves, and flagmen. The company employed eight other men in similar capacities; each man had his own district, and those who worked at a distance were supplied with bicycles; the men were not bound to use them, but no man would take a district unless he got a bicycle. The evidence shewed that the use of a bicycle was part of the arrangement and a term of the contract of engagement. These bicycles belonged to the company. On September 25, 1912, Edwards' work ended at 6 p.m. and he proceeded to go home on his bicycle, a distance of about four and a half miles, but there was no evidence whether he went by the shortest route. On the way home he came into collision with a motor lorry and sustained injuries from which he died the next day. His widow and son applied as dependants for arbitration to settle the liability of the company and the amount of compensation payable to the dependants.

The learned judge held that the accident did not arise out of and in the course of the employment, and made an award declaring that no compensation was payable under the Act.

The dependants appealed.

J. G. Joseph, for the appellants. It was an express term of this contract that a bicycle should be provided for the use of the deceased workman. Without it the contract would not have been made. That brings this case exactly within *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1), where the use of the train was an implied term of the service. The only difference is that here the use of the bicycle is an express term. In *Davies v. Rhymney Iron Co., Ltd.* (2), which was relied on below, the use of the train was optional. The fact that at the time of the accident the bicycle was under the sole control of the deceased is immaterial: *Mole v. Wadworth.* (3) If the employment began when he left his home and continued till he returned the question of special risks does not arise. His employment included riding the

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(1) [1908] 1 K. B. 469.

(2) (1900) 16 Times L. R. 329.

(3) (1913) W. C. & Ins. Rep. 160;
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bicycle. *Greene v. Shaw* (1) was referred to, but there was no contract there that a bicycle should be supplied or used, although it was used with the consent of the employer. Where a man uses the means provided by his employer under the contract of service for going to and from his work, and meets with an accident whilst doing so, that accident arises out of and in the course of his employment: *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (2); *Gilbert v. Owners of Steam Trawler Nizam.* (3) The Court will presume that he was going home to make up his daily sheet.

Rigby Swift, K.C., and *W. H. Duckworth*, for the employers. There was no evidence on which the learned judge was bound to find that the accident arose out of and in the course of the employment. The case is not similar to *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (2), for in that case the train was controlled by the employers and was held to be part of their premises, so that the employment continued whilst the workman was in the train. It is true that in *Mole v. Wadworth* (4) the workman had the sole control of the boat, but it was the only possible means of access, and he was not allowed to use it in other ways. It was no part of this man's duty to ride the bicycle; the provision of the bicycle was merely an extra payment, and he could use it as he pleased. He had finished his work and his employment was ended at 6 p.m. The use of the bicycle did not form part of the work as in *Pierce v. Provident Clothing and Supply Co., Ltd.* (5) The relation of employer and workman had ended: *Whitbread v. Arnold* (6); *Williams v. Sir G. A. Smith* (7); *Hoskins v. J. Lancaster* (8); *Kitchenham v. Owners of S.S. Johannesburg.* (9)

[SWINFEN EADY L.J. referred to *Nolan v. Porter & Sons.* (10)]

That is very like this case and is in the employers' favour.

J. G. Joseph in reply. In *Nolan v. Porter & Sons* (10) the railway ticket was a gratuitous concession, not a term of the

(1) (1911) 5 B. W. C. C. 573.

(2) [1908] 1 K. B. 469.

(3) [1910] 2 K. B. 555.

(4) (1913) W. C. & Ins. Rep. 160;
6 B. W. C. C. 128.

(5) [1911] 1 K. B. 997.

(6) (1908) 1 B. W. C. C. 317.

(7) (1913) 6 B. W. C. C. 101.

(8) (1910) 3 B. W. C. C. 476.

(9) [1911] A. C. 417.

(10) (1909) 2 B. W. C. C. 106.

contract. In *Mole v. Wadworth* (1) the employment was ended and the boat was under the workman's control; and that decision exactly covers this case. In a business sense it was essential that the workman should use the boat. Here it was part of the service that he should use the bicycle

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COZENS-HARDY M.R. This appeal raises a difficult question. We have had the advantage of very careful arguments on both sides, and I have come to the conclusion that the appeal fails. The facts are not in dispute and may be stated very shortly. The deceased man was employed by some agricultural implement makers in Kent. They had a number of threshing machines at work, and the deceased was employed to go to different places to look after the work and his employers' interests. He was also employed very frequently to look after a particular threshing machine in a particular place. The distances he had to go, particularly when going round and looking after their interests, were very considerable. The employers provided a bicycle. The workman was not bound to use it, but the evidence was that no man would take a district without having the use of a bicycle. On the day of his death his work ended at 6 p.m., at which time his payment per hour ceased. He then went homewards on the bicycle, and whilst riding on the main road between Canterbury and Dover a motor lorry ran into him and he was killed. In these circumstances a claim was made by his dependants, and the county court judge has awarded in favour of the respondents. Unfortunately we are not favoured with his reasons, but we have a good note of the evidence taken by him.

It has been laid down again and again by this Court, and I should be very sorry to think there was any doubt about it, that the protection given by the Act to a workman does not extend to his going to and from his work, unless there are some special circumstances. Take a concrete case. When a number of men are leaving factory gates to go through the streets to their homes half a mile or a mile away, they are not within the protection of the Act. On the other hand the terms of the contract of

(1) (1913) W. C. & Ins. Rep. 160; 6 B. W. C. C. 128.

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employment may be such as to define not only the rights but also the obligations of the workman and satisfy the Court as to the time at which the employment begins and ends. We have heard a good deal about *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1), and counsel has urged us to say nothing to the contrary of that case. I certainly have no intention of doing so. I think the decision in that case was right, and even if it was not right it is binding upon this Court. What did the Court decide there? We did not say that the protection of the Act extended from the colliery to the workman's own home, but we did hold, to use my own words, that "it was an implied term of the contract of service that these trains should be provided by the employers, and that the colliers should have the right, if not the obligation, to travel to and fro without charge. This being so, it seems to me clear that the employment began when the colliers entered the train in the morning and ceased when they left the train in the evening, and that the employers are just as liable as they would admittedly have been if the accident had happened at the colliery itself." (2) I do not desire to depart in the least from what I said there. Then it has been said that this case is covered by *Mole v. Wadworth*. (3) There the county court judge had found facts which justified his finding as to the terms of an implied contract between the parties, that for upwards of thirteen or fourteen years the workman had used a boat to cross the Wye to and from his work, and that the work could not have been done without this boat. He did not say that it was physically impossible to go another way, but from a business point of view it was not reasonable or in the contemplation of either of the parties that he should do anything else but go by the boat. Then the county court judge took the view that the case came exactly within the case of *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1) and was not distinguishable from it, and the counsel instructed to argue that case, who is certainly not without experience or one who fails to put his case accurately and forcibly, said "this is *Cremins v. Guest, Keen & Nettlefolds, Ltd.*" He is not the man to take up the time of the Court by arguing a case which is unarguable and he

(1) [1908] 1 K. B. 469.

(2) [1908] 1 K. B. 471.

(3) (1913) W. C. & Ins. Rep. 160
6 B. W. C. C. 128.

said he could not argue it. I think he was quite right in saying so.

What is the bearing of those cases? They seem to me to turn on the point of whether the accident happened in the course of the employment. When does the employment of a man in such circumstances begin? Except in such a case as that of a domestic servant where the employment is continuous, the employment must begin at some time and place and end at some time and place. Here the employment ended at 6 P.M. The man was under no obligation to his employer after 6 o'clock to move away from where he was working and to ride home on the bicycle. I cannot see what importance can be attached to the fact that he was allowed to use the bicycle on his way home at the time of the accident. If the accident had happened in going from one place to another during his work of inspection, I assume that the workman could have recovered, that is I assume without deciding that in such a case the accident would have arisen not only in the course of but also out of the employment. In my opinion the appeal in this case fails because the accident did not arise in the course of the employment. The appeal fails and must be dismissed.

KENNEDY L.J. I do not differ from the conclusion of the Master of the Rolls, nor do I wish to be thought not to consent to it, but I have come to that conclusion with great hesitation. Many things seem to me to be clear, and one is the fact that makes against the appellants that this unfortunate man met with his death when riding his bicycle after the time at which his paid employment ended. He was paid so much an hour, and one of the facts in evidence before us is that the hours for which he was paid ended at 6 P.M. He was riding a bicycle after that hour when the accident happened. On the other hand there is a fact that has created considerable difficulty, namely, that, just as in *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1) and *Mole v. Wadworth* (2), the use of the particular vehicle was a part of the arrangement with the employer. The evidence was that "the

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use of a bicycle is part of the arrangement and a term of the contract of engagement." But for that I do not think any arguable case could have been made. Although no doubt "work" and "employment" are not identical terms and work may end before the employment ends, on the facts of the present case I am not prepared to dissent from the view that the employment as well as the work of the deceased had ended before the accident happened. So far as "out of" as well as "in the course of" is concerned, if this man when he was fatally injured had been going from one place where he was employed to another, I should have been prepared to hold that, as the use of the bicycle was a term of his employment, it made an accident happening at that time an accident arising out of as well as in the course of the employment. The difficulty in the way of the appellants is that it was not shewn that the going home was one of the things for which he was entitled by contract to use the bicycle. If that is so and his paid hours of work were over, I do not see how the accident can be said to have arisen in the course of the employment. The doubt which I have felt has arisen from a comparison of this case with two previous decisions of this Court. With regard to *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1) there is a sensible difference, I agree, in the fact that in that case the workman was practically continuing the employment while he was in the train. Indeed the Master of the Rolls has told us that this was the principle of that decision, namely, that the employment was practically continuous on the part of the workman whilst in the train, although it was not absolutely compulsory that the workman should use the train. I have felt more difficulty in distinguishing *Mole v. Wadworth* (2) from the present case because there the man was a day labourer who had the use of a boat merely by permission and the user was after the work of the day was over. That case is very near this, but there is this distinction between them, that that special vehicle, the boat, was the only means by which he could get home. Here all that was stipulated for was the use of a bicycle, and these two cases are in their facts not

(1) [1908] 1 K. B. 469.

(2) (1913) W. C. & Ins. Rep. 160; 6 B. W. C. C. 128.

so indistinguishable from the one we are now considering that I am compelled to do that which I should be very unwilling to do, namely, to differ from the Master of the Rolls, who presided in this Court when both those cases were heard, although I have felt some hesitation from which I still do not feel myself altogether free.

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SWINFEN EADY L.J. I too agree that the appeal fails. Questions of difficulty must from time to time arise in determining when the course of the employment begins and ends. On the one hand there is no doubt that the employment may commence before the working place is reached, and on the other hand it may continue after the workman has left the working place. *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1), a decision from which we are urged not to depart, and from which we could not depart if we would, was determined quite clearly on the ground that at the time when the accident in question happened the employment was still continuing. There the Master of the Rolls said (2): "it seems to me clear that the employment began when the colliers entered the train in the morning and ceased when they left the train in the evening, and that the employers are just as liable as they would admittedly have been if the accident had happened at the colliery itself." That was the ground on which the judgment proceeded. Then the Master of the Rolls continued with a statement to prevent the judgment being interpreted as going further than it was intended to go: "To avoid misconception, I desire to say that I base my judgment on the implied term of the contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employer's place of business." That case was followed by *Mole v. Wadworth* (3), which was not argued. In the Court below the county court judge said in terms that he would follow *Cremins v. Guest, Keen & Nettlefolds, Ltd.* (1), and he laid down no new proposition of law. In the present case, if the appellants are to succeed, when is it said

(1) [1908] 1 K. B. 469.

(2) [1908] 1 K. B. at p. 472.

(3) (1913) W. C. & Ins. Rep. 160;
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that the employment began and ended? If it was not when he began and left off work the only other time which can be suggested is that it began when he left home and continued until he returned home in the evening, which would be extravagant. This case is not altogether dissimilar from that of *Nolan v. Porter & Sons*. (1) There the employer had not lent a bicycle, but had given the workman a return ticket to the dock railway station, telling him to report himself on board a ship at 7 A.M. Before he reached the ship he fell into a dock and was injured. It was held that he had no claim for compensation. The Master of the Rolls in giving judgment said: "I think that this is a plain case. The question is whether the accident arose out of and in the course of the workman's employment. The contention that the employment began when the workman left his home is clearly an extravagant proposition. The employers gave the man a return ticket to the station near the ship. The man went by train, but instead of getting aboard ship he made a mistake as to the position of the gangway and fell into the dock. At that time, in my opinion, his employment had not yet begun, so that the accident did not arise out of and in the course of his employment." I think in the present case the conclusion of the learned county court judge that this unfortunate man did not meet with his death as the result of an accident in the course of his employment was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Mowll & Mowll, for Mowll & Mowll, Canterbury;*
Wm. Hurd & Sons.

(1) 2 B. W. C. C. 106.

H. C. R.

[IN THE COURT OF APPEAL.]

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McNALLY v. FURNESS, WITHEY & CO., LIMITED.

Employer and Workman—Compensation—Injury arising out of and in the Course of Employment—Incapacity—Supervening Incapacity not due to Accident—Imprisonment—Right to Compensation not affected—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.

A workman was injured on July 31, 1912. The employers admitted liability under the Workmen's Compensation Act, 1906, and paid him compensation at the rate of 1*l.* a week. On January 8, 1913, the workman was arrested and on January 21 sentenced to eighteen months' imprisonment with hard labour for larceny from the person. The employers thereupon ceased to pay the compensation. The workman issued a request for arbitration claiming 1*l.* weekly. The employers resisted the claim on the grounds (1.) that all incapacity ceased on January 18, 1913; (2.) that the present incapacity was not due to the accident; and (3.) that they were not liable to pay compensation during the continuance of the workman's detention in prison. The county court judge found that the workman was still partially incapacitated as the result of the accident and held that he was not deprived of his right to be paid compensation by reason of his being in prison, and he awarded him 12*s.* a week during partial incapacity:—

Held, that the supervening incapacity arising from his imprisonment was not a reason for depriving the workman of compensation.

Principle laid down in *Harwood v. Wyken Colliery Co.*, [1913] 2 K. B. 158, followed.

APPEAL from an award of the judge of the county court holden at Southwark, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a stevedore. On July 31, 1912, he injured his knee whilst in the employment of respondents.

The respondents admitted liability and paid the applicant compensation at the rate of 1*l.* a week, being half the amount of his weekly wages, until January 18, 1913.

On January 8, 1913, the applicant was arrested and on January 21 convicted of stealing from the person and sentenced to eighteen months' imprisonment with hard labour. The respondents thereupon discontinued the payment of the compensation.

On March 19 the applicant, describing himself as "late of

C. A. 5, Mary Ann Street, Beckchurch Street, Commercial Road, E.,
1913 at present an inmate of H. M. Prison, Wormwood Scrubs,"
McNALLY commenced arbitration proceedings, claiming compensation at
v. the rate of 1*l.* per week. The respondents resisted the claim
FURNESS, on the grounds (1.) that all incapacity ceased on January 18,
WITHEY & CO., 1913; (2.) that the present incapacity was not due to the
LIMITED. accident; and (3.) that they were not liable to pay compensa-
tion during the continuance of the applicant's detention
in prison. At the hearing before the county court judge on
April 22 evidence was given by the prison doctor to the effect
that the applicant was then only partially incapacitated. On
May 19 the county court judge delivered a considered judg-
ment, in which he found that the applicant was still partially
incapacitated; that the incapacity existing was due to the
accident; and that he was able to do light work. He held
that the applicant was not deprived of his right to be paid
compensation by reason of his detention in prison and awarded
him 12*s.* a week during partial incapacity.

The respondents appealed.

J. Sankey, K.C., and I. H. Stranger, for the appellants. A
man in the position of the respondent is not entitled to take
advantage of the provisions of the Workmen's Compensation
Act, 1906. The respondent is not, it is submitted, entitled to
any compensation on the following grounds: (1.) That the Act
was passed to compensate workmen for incapacity to earn wages
owing to an injury, and that the incapacity in this case is not
due to the injury; (2.) that the respondent being in prison the
appellants had no opportunity of giving him light work during
his incapacity; and (3.) that for the same reason they had no
opportunity of having him examined by their own doctor. A
fourth ground, or rather test, is that supposing the respondent
had been sentenced to twenty years' penal servitude, could it
have been suggested that the appellants would be liable to pay
compensation during the whole of that period?

The scheme of the Act is to compensate workmen for injuries
sustained by accidents, and it is impossible to say what the
respondent's loss has been. The appellants might, but for the

imprisonment of the respondent, have taken him back into their service and paid him his full wages, in which case he would not have been entitled to any compensation. The Act gives no compensation for pain or suffering, but only for loss of power to earn wages: *Ball v. William Hunt & Sons, Ltd.* (1); *Lysons v. Andrew Knowles & Sons, Ltd.* (2) The only person who has a right to compensation is the man himself: Sched. I., par. 1 (b). The object of the Act is to secure a means of livelihood for the workman. Prima facie this is secured to him whilst in prison. *Harwood v. Wyken Colliery Co.* (3), upon which the learned county court judge based his decision in the present case, is distinguishable. There the supervening infirmity was physical; here the supervening incapacity is one of status due to the misconduct of the workman himself. The respondent is prevented from earning wages because he is in prison, where he is being maintained at the expense of the State. It is contrary to public policy that a man should better his position financially by the commission of a crime, and that will be the result in the present case if the respondent succeeds.

[KENNEDY L.J. referred to *McCallum v. Quinn*. (4)]

[They also referred to *Clayton & Shuttleworth, Ltd. v. Dobbs* (5); Sched. I., pars. 3, 4, 14, 15; Regulations of June 28, 1907.]

C. Doughty and *R. T. Monier-Williams*, for the respondent, were not called upon to argue.

COZENS-HARDY M.R. This case has been very fully and ably argued by Mr. Sankey on the part of the appellants, and I feel sure that every argument which could be adduced has been forcibly drawn to our attention; but as those arguments have not left any doubt on my mind, I do not think any advantage will be attained by listening to the arguments of the respondent.

It is a curious case undoubtedly, the like of which has never been brought before this Court. It is a case where there was an admitted accident to McNally, the workman, who was a stevedore. He was employed by Furness, Withy & Co., Limited,

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(1) [1912] A. C. 496, 499, 504,
505, 507.

(3) [1913] 2 K. B. 158.

(4) 1909 S. C. 227, 229.

(5) (1908) 2 B. W. C. C. 488.

(2) [1901] A. C. 79.

C. A. 1913 <hr/> McNALLY v. FURNESS, WITHY & Co., LIMITED. <hr/> Cozens-Hardy M.R.	and his wages were 2 <i>l.</i> a week. The accident happened on July 31, 1912. The employers admitted liability by paying 1 <i>l.</i> a week from that date, and they continued that payment until January 18, 1913. The reason why they then discontinued it was this, that on January 8 McNally was arrested for stealing from the person, and on January 21 he was sentenced to eighteen months' imprisonment with hard labour and taken to Wormwood Scrubs prison, where he now is.
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On March 19 McNally, giving his address as at present in His Majesty's Prison, Wormwood Scrubs, applied under the Workmen's Compensation Act for an award, and he seeks a continuance of the payment. That the man's disability continues was established by the evidence of the prison doctor before the learned county court judge. The learned county court judge found as a fact that his partial disability still continues, but he only awarded the sum of 12*s.* instead of 1*l.* a week.

That raises in point this question: Does the right of the workman to be paid compensation cease to exist, or, putting it rather more favourably to Mr. Sankey, is it to be suspended because, as it is said, and said with some truth, his incapacity to earn wages is now due to the fact that he is confined to prison for a year and a half from last January?

Mr. Sankey took no less than four points, each of which he elaborated with force. He says that the incapacity to earn wages is not due to the accident; that the employers have no opportunity of giving light work or any work to the workman; that they are precluded from examining him by their own doctor as they ought to have the opportunity of doing; and finally he asks whether, supposing the workman got twenty years' penal servitude, the employers would have to go on paying him full compensation during the whole of that period.

If this case had been brought before us twelve months ago, I am bound to say that I should have listened to the arguments on the other side, and I feel sure that I should have thought them worthy of a considered judgment. But in January of the present year we had before us the case of *Harwood v. Wyken Colliery Co.* (1), in which we did reserve judgment. That was a

case in my opinion of very great importance, and one in which this Court deliberately laid down a principle which I should be very sorry in any way to be supposed to be departing from. I will state what the facts were in that case in order to indicate where, if at all, they differ from those in the present case. There a man had admittedly met with an accident which disabled him from doing his own work as a miner. The nature of the accident is quite immaterial, but supervening on the accident came heart disease, not connected with, or caused by, the accident. The learned county court judge found that "If there had been no accident at all, he would still be incapacitated for work as a miner or banksman. I am of opinion that there is no work which since May 20, 1912, the accident has prevented him from doing which the heart disease would not also have prevented him from doing." Upon that ground the learned county court judge held that the workman was not entitled to compensation. From that decision there was an appeal, and after a most careful consideration of the case we held that the workman was not disentitled to compensation by reason of some supervening infirmity not due to the accident which had equally resulted in his incapacity. Mr. Sankey accepts that decision, as of course he is bound to do; but he says that that doctrine applies only where you have as he said two physical defects, and it has no application at all where the second supervening defect is one not involving physical disability in the ordinary sense. I can find no justification for that distinction. It seems to me that *Harwood v. Wyken Colliery Co.* (1), which I am bound to assume to have been rightly decided, governs in principle the present case, and that if it is found as a fact, as the learned county court judge has here found, that the man when examined in his present residence, which happens to be Wormwood Scrubs, is now suffering from a partial disability by reason of what happened when engaged on the employers' work, the employers' liability is not affected by reason of that which supervenes, namely, that the man cannot get out of prison now to try to get work. The test is not what wages he is actually earning, but what, having regard to his physical capacity, he is capable of earning. There was

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evidence upon which the learned county judge found that, and I should be very sorry that any distinction should be drawn between a case of supervening heart disease and a case of supervening imprisonment which prevents a man from getting out to do his work. That is the first and main point which Mr. Sankey made.

The other points raised do not really seem to me to be of any importance one way or the other. Mr. Sankey says that no opportunity was afforded the employers of giving the man light work. That only means that one of the tests which in many instances is available for ascertaining whether a man is capable of doing work or not cannot be applied here. That is a fact; but the right to compensation cannot be said to depend upon whether the employer is in a position to offer light work or not.

Then exactly the same point arises on the question of the right of examination. It is quite true that the Act contemplates that the employer should have the right to examine the man, and to send his own doctor to examine him, at certain specified times. I see no reason to doubt that this examination could be made here. We have had our attention called to the prison regulations, and although they do not in terms apply to this particular case, I do not think that the proper consent would not be given on any application on behalf of the employers to have the man examined with proper supervision by the employers' doctor in Wormwood Scrubs.

Then Mr. Sankey said, "Supposing the man had got twenty years' penal servitude, must the employers continue to pay him compensation?" The answer is, Yes, they must. We know what hard cases are said to make. It may be that the Legislature did not contemplate a case of this kind; neither did the Legislature contemplate a case of supervening lunacy, but yet it has been held that when a man is shut up in an asylum where he is not allowed to go out to his work, and is only able to do a little gardening, the employer is still liable. I cannot draw any distinction between (1.) supervening lunacy which is not occasioned by a subsequent accident affecting the body, such as a blow on the head, or (2.) supervening imbecility following on old age, or (3.) detention by law in Wormwood Scrubs.

In my opinion we should be departing from the principle laid down in *Harwood's Case* (1) if we acceded to the argument which has been addressed to us by Mr. Sankey on behalf of the appellants, and therefore in my opinion this appeal must be dismissed.

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KENNEDY L.J. I am of the same opinion. The learned county court judge, in dealing with the question of compensation to this particular workman, came to the conclusion that he was still partially incapacitated, and that the incapacity existing was due to the accident, and he found further that the applicant was able to do light work. Therefore, whereas before he had been receiving from his employers in reference to the incapacity arising from an undoubted injury, out of and in the course of his employment by them, 1*l.* a week, that was reduced, in accordance with this finding, to 12*s.* a week. What is contended for by the appellants is that, while the statement as to his partial incapacity being due to the accident is true, and that there was evidence to support it, which is not now challenged, yet that no award of 12*s.* a week ought to be made because the man, owing to his having committed an offence, is now undergoing, and will continue for some months to undergo, imprisonment for that offence; and therefore, quite apart from the existing incapacity caused by the injury, could not earn money. Therefore in that sense he is incapacitated by another cause than the injury from earning money; and further, by way, as it were, of at any rate a strong reason for holding that in law no compensation ought to have been awarded, that it is, by reason of the imprisonment, impossible for the employers to offer him either employment at the full rate of wage, or employment at lighter work with such a payment that would naturally still further reduce the amount which would be awarded to him.

With regard to the last question I am still of opinion, as it occurred to me when I listened to the argument, that, after all, the highest at which it can be put is that there is a possible disadvantage with regard to the evidence which the employer, in a case of this kind, might adduce; but I entirely decline to consider that as

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a guide at all to our judgment in this case, because the test of the right to compensation at the time this question had to be discussed before the arbitrator was, Aye or No, was the man at the time partially incapacitated for work? That is a matter which can be dealt with, and must be dealt with, quite apart from any offer of the employers to give work, either light work or work at the full rate of wages. The learned arbitrator has come to a conclusion as to whether the man is able to work, and that ability is a question which, in this case apparently, was left by the employers to be dealt with upon the evidence of the medical officer of the prison, who, of course, had the man under supervision at the time. It is the incapacity for work which is the question, and the degree of that incapacity is that which, according to the discretion of the arbitrator, determines the amount of compensation the man is entitled to at the time. There is no doubt that at the time of this award the man was partially incapacitated for work, and that that incapacity was an incapacity resulting still from the injury. I agree with what was, I think, necessarily involved in the judgment of Hamilton L.J. in *Harwood v. Wyken Colliery Co.* (1) You are not entitled to read into the Act after the word "injury" the word "solely" which is not there. The principle, as the Master of the Rolls has just said, of *Harwood v. Wyken Colliery Co.* (2) is one which applies to this case. It was there held that it is no answer to the claim of the injured workman for the employer to say, while admitting that there is still continuing incapacity, "You have also another incapacity caused by something for which I am not responsible which did not arise out of the accident, and therefore, as you would be incapacitated or partially incapacitated from working quite apart from the accident, I have not to pay you any compensation, although I have, at the same time, to admit that you are also incapacitated by the injury for which the Legislature has decreed there should be compensation."

I do not think that the matter can be put better than it is put in the judgment of Lord Pearson in *McCallum v. Quinn* (3),

(1) [1913] 2 K. B. D. 158, 169.

(2) [1913] 2 K. B. 158.

(3) 1909 S. C. 227, 229.

which was quoted by counsel in the argument in *Harwood's Case* (1), namely, that "it rests upon the employer to prove (1.) that the supervenient cause was not connected with the original injuries, and (2.) that the original injuries have ceased to operate as an effective cause of incapacity." The original injuries have been found in this case to continue to operate as the cause of incapacity, and in accordance with the judgment in that case the workman is entitled to compensation. For my part I do not think we ought to consider whether in this way or in that the particular incapacity, not resulting from the accident but from his imprisonment, might produce some difficulties in the way of evidence, or result in putting the workman in a better financial position than, if we had to legislate, we might think right. That is a question with which the Legislature must deal. We have only to deal with the law as it stands.

For the reasons which are given in the very carefully considered judgments in *Harwood v. Wyken Colliery Co.* (2), I think there is sufficient here to justify us in dismissing this appeal.

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SWINFEN EADY L.J. I am of the same opinion. The case is one of an injured workman suffering from partial incapacity directly resulting from the injury, so that the workman brings himself within the Act. It is a case in which in an employment personal injury by accident, arising out of and in the course of the employment, has been caused to a workman, and the employer is liable to pay compensation as set out in the schedule. His partial incapacity directly results from the injury, and his incapacity to earn any wages is also attributable to his imprisonment. The language which was used in *Harwood v. Wyken Colliery Co.* (2) is, in terms, exactly applicable to the present case, reading it in this way: The workman is incapacitated by both causes, each independent of the other, each operating as if the other did not exist. He was rendered incapable of doing any but light work owing to the accident—that is this present case—and he is also incapable of doing any but light work, in this case, in consequence of the

(1) [1913] 2 K. B. 158, 160.

(2) [1913] 2 K. B. 158.

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imprisonment. It will be observed that the scale upon which the employers have now to pay compensation is upon the footing that he has been rendered incapable of doing any but light work on account of the accident. That is why the award has been reduced from the old sum of 20s. a week, which was voluntarily paid for a considerable time and is now no longer being paid, to 12s. a week.

In my opinion this passage in the judgment of Hamilton L.J. in *Harwood's Case* (1) which has been referred to is exactly applicable to the present case: "It cannot be said of him" (the workman) "that partial incapacity for work has not resulted, and is not still resulting, from the injury. All that can be said is that such partial incapacity is not still resulting 'solely' from the injury. To read the word 'solely' into the Act after the word 'injury' is not interpretation but is legislation."

For these reasons I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Downing, Handcock, Middleton & Lewis ; Pattinson & Brewer.*

(1) [1913] 1 K. B. 158, 169.

W. I. C.

[IN THE COURT OF APPEAL.]

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WEBBER v. THE WANSBOROUGH PAPER COMPANY,
LIMITED.1913
July 3, 21.

[No. 58 of 1912.]

Employer and Workman—Compensation—Accident arising “out of and in the course of” the Employment—Ship—Ladder—Sphere of Employment—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

While the respondents’ ship was lying in harbour, the applicant, a seaman, who was employed in unloading the vessel, after his duties for the day were over, left the ship to go to his home ashore. In doing so he had to cross a plank, one end of which rested on the deck, the other end being placed upon a rung of a ladder which was permanently fixed to and formed part of the quay. He crossed the plank in safety, but when he had ascended a few steps of the ladder he slipped and fell from it, sustaining an injury in respect of which the county court judge awarded him compensation under the Workmen’s Compensation Act, 1906 :—

Held, on appeal, that the sphere of the applicant’s employment was the ship and not the quay, and that as he was injured while he was ascending the fixed ladder attached to the quay the accident did not arise out of and in the course of the employment.

The principle laid down in *Low or Jackson v. General Steam Fishing Co.* [1909] A. C. 523, adopted.

APPEAL from a decision of the judge of the Somersetshire County Court sitting at Williton as an arbitrator under the Workmen’s Compensation Act, 1906, whereby he awarded compensation to Frank Webber in respect of injuries sustained by him while in the employ of the appellants on June 8, 1912.

The appellants were the owners of a ketch named the *Charlotte*, trading between Watchet and South Wales. Webber was employed on the ketch as a seaman. Part of his duty was to assist in loading and unloading the ship, and to close the hatches for the night after the loading or unloading was finished. On June 8, 1912, the ketch was in harbour at Watchet and was lying moored to the quay. She was connected with the quay by a plank, one end of which was on the vessel, the other end

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being placed on a ladder which was permanently fixed to the wall of the quay. Webber, who lived ashore while the ship was in harbour, after finishing his work and closing the hatches left the ship on his way home. He safely crossed the plank, but when partly up the ladder he slipped and fell between the vessel and the quay, sustaining an injury to his foot. The county court judge held that the ladder was part of the means of access to the ship, and that on the particular facts of the case the accident arose out of and in the course of the employment; and he awarded compensation accordingly.

The employers appealed.

A. Neilson, for the appellants. The county court judge has come to a conclusion which is wrong in point of law. The workman had left the ambit of his employment and the accident cannot truly be said to have arisen "out of" the employment. The risk to which the man was exposed was not incident to the employment and did not arise out of it.

This case is covered by *Cook v. S.S. Montreal*. (1) In *Kitchenham v. S.S. Johannesburg* (2) Fletcher Moulton L.J. said "any accident that occurs during the period of his" (a seaman's) "being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of the crew of the ship, and therefore is one which does not 'arise out of his employment.'" That was expressly affirmed by the House of Lords (3), and mutatis mutandis those observations of Fletcher Moulton L.J. apply to the present case. [He also referred to *Kelly v. Foam Queen*. (4)]

D. Knocker, for the respondent. The principles which govern this case were laid down by the House of Lords in *Low or Jackson v. General Steam Fishing Co.* (5)

[COZENS-HARDY M.R. There the quay, from which the man fell into the water and was drowned, was within the ambit of his employment.]

It is submitted that the accident in this case arose both "out of

(1) (1913) 6 B. W. C. C. 220.

(3) [1911] A. C. 417.

(2) [1911] 1 K. B. 523, 526.

(4) (1910) 3 B. W. C. C. 113.

(5) [1909] A. C. 523.

and in the course of the employment": *Moore v. Manchester Liners, Ltd.* (1); *Craske v. Wigan* (2); *Gallant v. S.S. Gabir*. (3)
Neilson in reply referred to *Mitchell v. Owners of S.S. Saxon*. (4)

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July 21. COZENS-HARDY M.R. This appeal raises a question which has often troubled the Court: When does employment begin and when does it end? The limits must be laid down in order to ascertain whether an accident arises "in the course of" the employment. Two propositions are well established: (1.) Employment is not to be confounded with work. For example, a collier's employment begins before he uses his pick on the face of the coal. (2.) Employment does not continue during the whole time occupied by going to or from the workman's home from or to the actual place of work. For example, a sailor meets with an accident on the high road or on the quay, he not being there on ship's business, but for his own purposes. It can make no difference whether he was going from the ship or returning to the ship. When the accident happened while he was not on the surface of the quay, but on a fixed ladder forming part of the quay property and lawfully used for the purpose of getting to or from the vessel, a real difficulty arises. But I think the difficulty has been solved by the House of Lords in *Low* or *Jackson v. General Steam Fishing Co.* (5) The facts must be carefully stated. A man was employed to watch trawlers as they lay in Granton Harbour. In the course of his watch he went ashore to get some refreshment and returned in a very short time towards the quay. While descending a fixed ladder attached to the quay to go on board one of the trawlers he fell into the water and was drowned. The sheriff-substitute awarded compensation to the dependant. The Court of Session reversed the decision on the ground that the deceased was not in the course of his employment when he met his death. This decision was reversed in the House of Lords by a majority of the noble Lords, but there was no difference of opinion on the only

(1) [1910] A. C. 498.

(3) (1913) 6 B. W. C. C. 9.

(2) [1909] 2 K. B. 635.

(4) (1912) 5 B. W. C. C. 623.

(5) [1909] A. C. 523.

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point material for the present purpose. The majority held that the sphere of the man's employment included the quay; the minority held that the sphere of the man's employment did not include the quay, but was limited to the trawlers. Lord Loreburn, who was one of the minority, held that when the man used the ladder he was not there in the course of his duty, by which I understand employment, but in the course of returning to it. Lord Ashbourne, who was one of the majority, said "He was not at the time of the accident going back to or returning to his employment. He had already, I think, come back when he had reached the quay." Lord James of Hereford took substantially the same view. Lord Atkinson, with whom Lord Shaw agreed, says the crucial question is whether the employee had, before the accident befell, reached the place where he was to discharge the duties of his employment. Lord Gorell, who agreed with Lord Loreburn, said "If the accident had occurred while he was on the same ladder going away from the trawlers for his own purposes I should have thought it would be reasonably clear that no claim could be maintained."

The same principle was adopted by this Court in the recent case of *Cook v. S.S. Montreal* (1), where we held that an accident happening on a dolphin, part of the quay premises, was not one which involved liability on the shipowners. I think it follows that a sailor whose sphere of employment is the ship, and not the quay, is not within the protection of the Act when he is ascending the fixed ladder attached to the quay.

The facts in the present case have been very clearly stated by his Honour Judge Lindley and are not in dispute. Webber was employed on a ketch which was lying in Watchet Harbour. He had been assisting in unloading the ship, and when that was finished he put on the hatches. His home was at Watchet, and the work being finished he was going home, for he was not living on board. He crossed a plank belonging to the ketch, one end of which rested on a fixed ladder, and he got a few steps on this fixed ladder when he slipped and fell between the ketch and the quay and was injured.

(1) 6 B. W. C. C. 220.

In these circumstances the learned county court judge has held that the accident arose out of and in the course of his employment. I have read his very careful judgment with attention. He seems to consider it sufficient that the ladder was the means of access to the ship, and was the proper means of access. But in my opinion this is not sufficient; the quay itself is the proper and necessary means of access, and no one would suggest that an accident on the surface of the quay by falling over some ropes would be within the Act. This is precisely the case put by Lord Gorell in the passage which I have read. That passage is consistent with what was said by all the noble Lords, and it is consistent with several decisions in this Court, some of which were cited with approval in the House of Lords.

In my opinion there was no evidence to justify the finding that the accident happened in the course of the employment, and the appeal must be allowed.

KENNEDY L.J. The material facts in this case appear clearly upon the notes taken by the learned county court judge, his Honour Judge Lindley, and in his very careful judgment. He held that the applicant, Frank Webber, was entitled to compensation. Those facts, as there stated, are that the applicant, Frank Webber, when he left the ketch had, in the language of the learned county court judge, ended his active duties on board the ketch for the day, but had not ended his contract of employment with the owners of the ketch. He was leaving the ketch because, whilst the ketch was in port, he slept at home, but he might, he deposed, have had to go again on board if he was wanted, and in any case he would go on board again on the following Monday. The sole means of passage to or from the ketch to the quay consisted of a plank laid from the ketch to a ladder which led from the top of the quay down the side of the quay to the bottom of the dock. By this route Webber had to go. Webber walked safely along the plank, but slipped whilst trying to climb the ladder, fell into the dock, and was seriously hurt. The question which his Honour Judge Lindley answered in favour of the applicant is, "Did this

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C. A. accident arise out of and in the course of his employment?"
 1913 Of course the mere fact found by the learned judge that the

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contract between Webber and the owners of the ketch was still subsisting does not decide this question. The contract might still subsist, and yet at the time and place of the accident the applicant might be doing something the risk of which ought not to be held to be a risk arising out of and in the course of his employment. But for a very recent judgment of this Court in *Cook v. S.S. Montreal* (1), I should have thought that there was a great deal to be considered in favour of the view that the plank and ladder which together formed the only means by which Webber could pass from ketch to quay ought to be treated, or at all events might be treated without error of law, as forming together a special means of access within the meaning of the important judgment of Fletcher Moulton L.J., in which the Master of the Rolls expressed his concurrence, in *Kitchenham v. S.S. Johannesburg*. (2) That was a case in which the applicant for compensation was hurt in going to his work on a vessel in harbour, and not, as in the present case, coming from it. But in no wise does this difference affect the legal position. As Buckley L.J. pointed out in *Cook v. S.S. Montreal* (1), "In the obligations contractually existing between master and servant, it is part of the duty of the master to afford the servant when he is dismissed reasonable facilities for leaving the place of employment, and if the servant is injured whilst availing himself of those facilities the master may be liable." What Fletcher Moulton L.J. laid down as the true legal principle, marking the border line in this class of case, was this: "I do not think it difficult to lay down the general principle by which our decision ought to be guided. The return to the ship is in the course of his (the man's) employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to his ship, as in *Moore v. Manchester Liners, Ltd.* (3), the accident is rightly said to

(1) 6 B. W. C. C. 220.

(2) [1911] 1 K. B. 523.

(3) [1910] A. C. 498.

arise out of his employment; but, if the accident is shewn to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto. For instance, if it were shewn that when the sailor returned to the ship there was a dense fog, that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned, I think that the accident would arise out of his employment. But, if all that is shewn is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment."

Having regard to this statement of the law I should, but for the decision of this Court in the recent case of *Cook v. S.S. Montreal* (1), have thought that there was a good deal to be said for the view that the plank and ladder, which together formed in the present case the only means of passing between the ketch and the quay, ought to be treated as together forming "a special means of access" within the meaning of Fletcher Moulton L.J.'s judgment, and that it was not until the applicant had reached the surface of the quay, where for the first time he could take any course he pleased, that it could be held, if a mishap occurred to him, that the accident was not one arising out of and in the course of his employment; or in other words, as the point is put by the Lord Justice, that it ought to be held that until he reached the quay, and while he was using the special means of access, he was "doing something specifically connected with his employment." But the decision in *Cook v. S.S. Montreal* (1) appears to me to preclude me, sitting in this Court, from entering upon the consideration of this view. That case was a decision of the Court of Appeal that the arbitrator was right in holding that, where a seaman, who had been discharged, stepped off the ship's ladder on to a dolphin in the dock—the dolphin forming, as the ladder does in the present case, a part of the dock premises—and somehow

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C. A. fell into the water between the dolphin and the quay and
 1913 was drowned, the employment had ended, and therefore his
 dependants could make no claim. I cannot see any sound distinction in regard to rights under the Workmen's Compensation Act between the legal position of the man who had reached the dolphin and the position of the present applicant when he reached the ladder. The only point of difference that I can discern in the facts of that case and the present is that the seaman's employment in *Cook's Case* (1) had finally terminated; he had been "dismissed," says the report (although he had still to get the balance of his pay at the shipping office on shore), and in the present case, according to the finding of the learned county court judge, the contract between Webber and the owners had not been finished. But I do not think this can make any difference, because the law beyond doubt is clearly stated by Buckley L.J. in the passage which I have already quoted from his judgment in *Cook's Case*. (1) See also the decision of the Court in *Gane v. Norton Hill Colliery*. (2) The present case, so far as this Court is concerned, is therefore concluded in my view by the judgment in *Cook v. S.S. Montreal* (1), and the judgment of his Honour Judge Lindley must be set aside, and this appeal allowed.

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 Kennedy L.J.

SWINFEN EADY L.J. The applicant, Frank Webber, is a seaman, employed on the ketch *Charlotte*, and lives at Watchet. On the day when the accident happened he had been assisting to discharge the cargo from the vessel then lying in Watchet Harbour. He had put on the hatches and had finished his work on the vessel and was going to his home ashore. When the vessel is at Watchet he lives at home. The vessel was moored near the quay, and a plank had been placed from the vessel to a permanent ladder fixed in the wall of the quay. He passed along the plank, had quitted it, and was ascending the ladder when he slipped and fell, injuring his left foot. He is paid by the trip. If the vessel is loaded both out and home, he receives 37s. for the trip; if only loaded one way, 30s. and an allowance of 1s. 2d. a day for victualling when away from Watchet. His work for the

(1) 6 B. W. C. C. 220.

(2) [1909] 2 K. B. 539.

trip begins when he opens the hatches to receive cargo, and ends when the voyage is ended, the cargo discharged, and he replaces the hatches. On the occasion of the accident the trip was completed, his work had ended and he was entitled to go home, when he started to do so. The county court judge awarded compensation, and the employer appeals.

Upon these facts the employer alleges that the accident did not arise out of and in the course of the employment. Having regard to the fact that the voyage had terminated, and that he was going home, as he was entitled to do, I am unable to distinguish this case from *Cook v. S.S. Montreal*. (1) The trimmer there had completed the voyage and was on his way home, but fell off the floating dolphin, which was a part of the dock premises. In the present case the ladder is a fixed part of the quay, while the dolphin was a floating stage, and the trimmer never reached the substantial structure of the quay itself; but this cannot make any difference in favour of the workman. In my opinion the present case is not distinguishable from *Cook v. S.S. Montreal* (1), and accordingly the accident did not arise in the course of the employment, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Holman, Birdwood & Co., for Hagon & Teek, Bridgwater; E. E. Baron Reed, for C. P. Clarke & Co., Taunton.*

(1) 6 B. W. C. C. 220.

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BROWN v. GEORGE KENT, LIMITED.

July 9, 21.

Employer and Workman—Workmen's Compensation—Accident—Supervening Disease—Incapacity resulting from Accident—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

A workman met with an accident in the course of and arising out of his employment which made it necessary to remove a cartilage from his knee. After the operation, which appeared successful, he caught scarlet fever while in a provincial hospital and was removed to an isolation hospital. While he was there the wound became unhealthy and suppurated. Another operation was then found necessary which caused the knee to become permanently stiff and immovable. There was evidence that the scarlet fever alone could not have caused the incapacity if there had been no accident, but that it had aggravated the effects of the accident:—

Held (reversing the decision of the county court judge), that the incapacity was caused by the accident, and that the workman was entitled to compensation under the Workmen's Compensation Act, 1906.

THIS was an appeal from an award of the county court judge of Luton under the Workmen's Compensation Act, 1906.

The applicant while cleaning windows for the respondents in the course of his employment on or about March 1, 1912, slipped off the stool on which he was standing and twisted his knee. He was taken to the hospital at Luton, and on April 2 the doctor there performed an operation by which he removed a cartilage from the knee. The operation was successful, but on April 6 the patient developed scarlet fever and was removed to the isolation hospital; while he was there the wound suppurated. The condition of the knee was not satisfactory, and, by the desire of the employers, the applicant was removed to London, and it was found necessary to perform another operation by which the knee joint was excised. The result was a stiff knee joint which could not be moved, and one leg a little shorter than the other.

The doctor who performed the second operation gave evidence that if there had been no accident and consequent injury to

the knee the scarlet fever could not have caused the present incapacity, and this was admitted. He also stated that if there had been no scarlet fever the present condition could have been caused by the accident, and this was not denied, but the medical witness for the respondents said that this could not have happened unless there had been indications in the wound at the time of the operation. It was agreed that if scarlet fever had not intervened the applicant would have been well in six weeks. It was admitted that the applicant must have caught the scarlet fever after he had been taken to the hospital.

The case was twice heard before the county court judge, and on February 20, 1913, he gave judgment that the employers were not liable, upon the ground that the applicant's vitality was not lowered by the accident so as to make him more liable to catch scarlet fever, and the fever was not in any sense brought on or caused by the accident as in the cases of *Thoburn v. Bedlington Colliery Co.* (1) and *Euman v. Dalziel & Co.* (2), or by the development owing to the accident of a tendency already existing in the man as mentioned by Fletcher Moulton L.J. in *Egerton v. Moore*. (3) The chain of causation was therefore broken and the accident was not the effective cause of the incapacity. He made his award in favour of the employers.

J. F. Eales, for the appellant. The observations of Fletcher Moulton L.J. in *Egerton v. Moore* (3) do not imply that an incapacity cannot be said to result from an accident where illness has supervened, unless the illness was caused by the development owing to the accident of a tendency already existing in the man. Moreover the Lord Justice was dealing with the question whether the employer had been prejudicially affected by the delay in giving notice. That case has nothing to do with the one under consideration. *Thoburn v. Bedlington Colliery Co.* (1) was a case of bronchitis followed by pneumonia caused by exposure which was indirectly the result of the accident. *Dunham v. Clare* (4) was a case of erysipelas coming on after

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(1) (1911) 5 B. W. C. C. 128.

(3) [1912] 2 K. B. 308, 314.

(2) (1912) 49 S. L. R. 693.

(4) [1902] 2 K. B. 292.

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the accident and it really covers this case. Erysipelas is a germ disease like scarlet fever. Incapacity may be the result of an accident though it is not a natural result: *Ystradowen Colliery Co. v. Griffiths*. (1) It is no defence for an employer to shew that a supervening illness would have caused the incapacity if the accident had not occurred: *Harwood v. Wyken Colliery Co.* (2) He must shew that the old cause is gone and a new one has been substituted.

Coutts Trotter, for the respondents. In the erysipelas case, *Dunham v. Clare* (3), the infection could only enter the body by means of the wound and could not have arisen without the wound. In *Thoburn v. Bedlington Colliery Co.* (4), which was a case of pneumonia, the disease did not enter the man's body by the wound, but the fatigue and exposure directly caused by the accident gave the germs of disease existing in the body an opportunity. In all the cases cited the disease would not have developed without the accident. In this case the scarlet fever germ entered the body through the mouth, not through the wound, and had no connection with the accident.

Hargreave v. Haughhead Coal Co., Ltd. (5) and *Billing v. Humphries* (6) are cases where disease supervened after, and was not caused by, the accident. *Adams v. Thompson* (7) is an instance where it was so caused.

The principle to be deduced from the cases is that where disease supervenes after an accident, the incapacity caused thereby will not be deemed to result from the accident, unless it can be shewn that the accident gave the disease its opportunity, either because the disease entered the body by a lesion caused by the accident, or because the accident or a consequent operation produced a lowered vitality without which the disease would not have attacked the patient.

J. F. Eales, in reply, cited *Clover, Clayton & Co., Ltd. v. Hughes*. (8)

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(1) [1909] 2 K. B. 533.

(2) [1913] 2 K. B. 158.

(3) [1902] 2 K. B. 292.

(4) 5 B. W. C. C. 128.

(5) [1912] A. C. 319.

(6) (1913) 6 B. W. C. C. 53.

(7) (1911) 5 B. W. C. C. 19.

(8) [1910] A. C. 242, 245.

July 21. The judgment of the Court (Cozens-Hardy M.R., Kennedy and Swinfen Eady L.JJ.) was delivered by

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SWINFEN EADY L.J. The workman appeals from the award of the county court judge whereby he determined that the incapacity caused by the accident shall be deemed to have ended, and that the weekly sum of 11s. 3d. paid to the workman from March 1, 1912, until the date of the award shall be discontinued.

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The grounds of the appeal are that the county court judge was wrong in law in holding that the incapacity from which the applicant is now admittedly suffering was not caused by accident arising out of and in the course of his employment, and that he misdirected himself upon the evidence in holding that there had been a new intervening cause.

The question which the county court judge had to consider and determine was whether the admitted incapacity in fact resulted from the injury. If so, the workman was entitled to recover although the incapacity may not have been the natural or probable consequence of the injury, and even although the fever contracted in the hospital aggravated the condition of the wound, and contributed to its unhealthy condition and to the resulting incapacity.

In *Dunham v. Clare* (1) Collins M.R. said: "The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes, and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences." See also *Ystradowen Colliery Co. v. Griffiths*. (2)

In the present case, the wound resulting from the operation (which operation was solely necessitated by the accident) did not heal, became unhealthy, suppurated, and necessitated a further operation, which has led to the present incapacity; the workman never recovered from the wound, or from the effects of the accident; the old cause of complaint never disappeared. It may well be that the fever, and the condition of the patient caused by it, much increased the risk of the formation of pus, but it was the old wound which was giving the trouble—the old wound

(1) [1902] 2 K. B. 292, 296.

(2) [1909] 2 K. B. 533.

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which was suppurating. It was the evidence of Dr. Bone, accepted and agreed to by both parties, that if there had not been any accident, and consequent injury to the knee, the scarlet fever could not have caused the injury or the incapacity in question. The result is necessarily that the incapacity is the result of the accident to the knee—although probably aggravated by the scarlet fever. This entitles the workman to compensation for the accident, on the footing that the incapacity caused by it is continuing.

The county court judge has, in our opinion, misdirected himself on the law. He proceeded to consider how the scarlet fever was contracted, whether the workman's lowered vitality lessened his capacity to resist the infection of scarlet fever, and said that lowered vitality was the keynote of the case—that if lowered vitality invited the scarlet fever, the chain of causation was complete, and the workman entitled to recover; if lowered vitality did not invite the scarlet fever, the chain of causation was broken and the workman was not entitled to recover. This was misdirection.

If the incapacity is the result of the accident, the chain of causation remains unbroken, although a fresh cause arising casually and "uninvited" by any special condition of the workman may have aggravated the original injury.

Whether there existed any lowered vitality of the workman in the present case, or whether such condition did or did not invite the scarlet fever, is not material, when once it is established that the incapacity is the result of the original accident, from the direct effects of which the workman never recovered; and if the scarlet fever germ encouraged the suppuration of the wounded knee, it matters not whether the germ entered the man's body through the wound, or through his mouth.

In our opinion this appeal should be allowed and the matter remitted to the county court judge.

The appellants must have the costs of the appeal.

Appeal allowed.

Solicitors: *F. W. F. Lathom, Luton; Watson, Sons & Room.*

J. R. B.

[IN THE COURT OF APPEAL.]

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July 17, 18, 21BRADLEY AND OTHERS *v.* WALLACES, LIMITED.

THOMPSON, MCKAY & CO., THIRD PARTIES.

Employer and Workman—Injury by Accident—Compensation—Remedy both against Employer and Stranger—Award against Employer—Right of Indemnity against Third Party—Damage from Kick of Horse—Liability of Owner—Scienter—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 6.

In the course of his employment a workman was killed by the kick of a horse belonging, not to his employers, but to third parties, by whose servant it was brought upon the employers' premises and left there unattended. Upon a claim by the dependants of the workman for compensation under the Workmen's Compensation Act, 1906, the employers admitted liability, but claimed contribution against the third parties under s. 6 of the Act. The county court judge held that the question of scienter on the part of the owners of the horse was immaterial, that the bringing of the horse upon the employers' premises was a trespass, and by reason of negligently leaving it there unattended they were liable to indemnify the employers:—

Held, on appeal, that the case was covered by *Cox v. Burbidge* (1863) 13 C. B. (N.S.) 430. It was not in the ordinary course of things that a horse not known to be vicious should kick a man. Assuming trespass, the damage in the present case did not naturally flow from it; it was too remote. The injury to the deceased was not sufficiently connected with the trespass or negligence to be the natural or probable consequence of it. The award against the third parties was therefore wrong.

APPEAL by third parties from an award of the judge of the Huddersfield County Court made under s. 6, sub-s. 2, of the Workmen's Compensation Act, 1906, upon a claim for indemnity by the respondents against the third parties.

The applicants were the dependants of a man named Bradley, who while in the service of the respondents, Wallaces, Limited, met with an accident arising out of and in the course of his employment which resulted in his death. The claim of the applicants against the respondents was admitted by all parties, and the only question on this appeal as between the third parties and the respondents was as to the liability of the third parties to indemnify the respondents under s. 6 of the Act. (1)

(1) Sect. 6 of the Workmen's Compensation Act, 1906, provides as follows: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some

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The circumstances under which the accident occurred were as follows. The respondents, Wallaces, Limited, were provision merchants carrying on business at Huddersfield. The deceased man Bradley was employed by them as a carter. They had in Huddersfield a warehouse and offices with a covered yard for the receipt and despatch of merchandise. On December 30, 1912, a teamster named Marsh, in the employ of Thompson, McKay & Co., who were railway carriers, took a waggon containing a consignment of eggs for delivery to the respondents' warehouse, and other goods for delivery elsewhere. It appeared that after delivering the respondents' goods he would have to take his waggon to another part of the town, necessitating an uphill journey, and for that part of the route he would require the assistance of a chain-horse. Accordingly he was accompanied to Wallaces' yard by another man, named Rhodes, also in the employ of Thompson, McKay & Co., leading a chain-horse belonging to them. On arriving at the yard Rhodes took the horse in and left it standing unattended in a corner while he went to assist Marsh in dealing with the waggon. While this was being done the deceased man, Bradley, brought one of his employers' horses out of its stable in order to harness it to a cart, and in so doing he had to pass so close behind the unattended horse of Thompson, McKay & Co. that he slightly touched its tail with his shoulder, whereupon it lashed out and kicked him, inflicting injuries from which he died. It was admitted that the horse was not known to be vicious.

On April 9, 1913, the applicants commenced proceedings for compensation against the employers, who served the third parties with a notice of claim to indemnity under s. 6.

person other than the employer to pay damages in respect thereof—(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2.) If the workman has recovered compensation under this

Act, the person by whom the compensation was paid . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

The county court judge held that the question of scienter was immaterial; the third parties were trespassers and therefore liable for the direct consequences of bringing their horse into the respondents' yard and negligently leaving it there unattended. He also found that there was no contributory negligence on the part of Bradley, and he made his award in favour of the respondents.

The third parties appealed.

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J. Sankey, K.C., and *H. Beazley*, for the appellants. The question in this case is whether the circumstances under which Bradley was fatally injured were such as to create a legal liability in the appellants to pay damages to the personal representatives of the deceased. That turns upon scienter, which the learned county court judge held to be immaterial. The submission is that the case is completely covered by the decision in *Cox v. Burbidge*. (1) The learned county court judge based his judgment on the finding that the horse was a trespasser, but that does not relieve the applicants from proving scienter. [They also referred to *Lee v. Riley* (2); *White v. Steadman*. (3)]

Haldinstein, K.C., and *Schwabe*, for the respondents. It is submitted that on both the grounds of trespass and negligence the judgment appealed from was right.

Cox v. Burbidge (1) was an entirely different case, the horse there being on the highway and kicking a child. The proof of scienter was of course necessary there. The present case is within *Lee v. Riley* (2) and *Ellis v. Loftus Iron Co.* (4) See also *Beckwith v. Shordike* (5) and *Sanders v. Teape*. (6)

There is a difference between the case of an involuntary trespass and one which is voluntary. Here the trespass on the part of the owners of the horse was voluntary and they are liable for what happened.

[KENNEDY L.J. Is it sufficiently the natural and probable consequence of the horse being left unattended on the respondents' premises that it should kick the man when touched by him?]

(1) 13 C. B. (N.S.) 430.

(2) (1865) 18 C. B. (N.S.) 722.

(3) [1913] 3 K. B. 340.

(4) (1874) L. R. 10 C. P. 10.

(5) (1767) 4 Burr. 2093.

(6) (1884) 51 L. T. 263.

C. A. As to that see *Whatman v. Pearson*. (1)

1913 [KENNEDY L.J. That case does not help us. Assuming trespass, was the kicking the natural and probable consequence?]

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The county court judge has found that what happened was the direct consequence of the negligence and trespass. It is submitted that there was evidence upon which he could come to that conclusion.

Sankey, K.C., in reply.

Cur. adv. vult.

July 21. COZENS-HARDY M.R. In this case Bradley, who was in the employment of Wallaces, Limited, met with an accident arising out of and in the course of his employment which resulted in his death. He was kicked by a horse belonging not to his employers, but to Thompson, McKay & Co. His employers have been held liable to pay compensation, and they applied under s. 6 of the Act for contribution by the owners of the horse. The learned county court judge has held in favour of the employers. In substance this application must be tried as though the workman was bringing an action against the owners of the horse. If the workman could have succeeded, the owners are now liable to contribute. If he could not have succeeded, no contribution can be recovered.

The material facts are shortly these: The deceased man was coming out of a stable opening on to a covered yard, leading a horse belonging to his employers. A cart or van belonging to Thompson, McKay & Co. was also in the yard for the purpose of delivering some goods to the employers. It had afterwards to deliver some other goods at a place some little way off. It was thought desirable, I presume on account of a hill, that a chain-horse should be brought to help to pull the cart. A horse was brought and left standing in a corner of the yard while the man who brought the horse was helping the carter. It was admitted that it was not known to be a vicious horse, or that it had ever kicked before. But the deceased man, in coming out of the stable, slightly touched the horse, which kicked violently and occasioned the death. The learned county court

judge has based his judgment on the ground that there was a trespass in bringing the horse into the yard (which I assume, though I rather doubt whether the finding was justified) and negligence in leaving the horse unattended. The question is whether on these findings the judgment can be sustained.

In my opinion, the judgment of the Court of Common Pleas in *Cox v. Burbidge* (1) is conclusive in favour of the present appellants. In the language of Erle C.J., "The owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. . . . But if the horse does something which is quite contrary to its ordinary nature, something which the owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has." It is not in the ordinary course of things that a horse, not known to be vicious, should kick a man. So far as trespass is concerned, if a horse, pursuant to its natural instincts, eats a neighbour's hay, or in any other respects indulges its ordinary natural instincts, the owner may be liable, but otherwise not. The damage in the present case does not naturally flow from the trespass and is not an ordinary consequence of the trespass. It is too remote. Does it make any difference that there was negligence on the part of the owners' man in leaving the horse unattended? In my opinion it does not. It is impossible to read the judgments in *Cox v. Burbidge* (1) without seeing that the negligence of the owner is not a vital point. The negligence can only render the owner liable for the ordinary and reasonable consequences of the negligence, and not for any damage which cannot fall within those terms. I can see no ground for holding that the man's negligence in leaving the horse unattended in any degree rendered the sudden and unexpected vicious act of kicking more probable.

In my opinion there was no evidence to justify the decision of the learned judge, and this appeal must be allowed.

KENNEDY L.J. In this case the question for our decision is whether or not the circumstances in which Bradley, a teamster in

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the employ of Wallaces, Limited (a company carrying on the business of provision merchants in Huddersfield and the respondents to this appeal), was unfortunately killed by the kick of a horse in the yard attached to their warehouse, were such as to create a legal liability in Thompson, McKay & Co., Limited, the owners of the horse, to pay damages to the personal representatives of the deceased workman under the provisions of the Fatal Accidents Act, 1846.

The form in which this question has arisen is that of a claim against Wallaces, Limited, as the employers of the deceased workman for compensation under the Workmen's Compensation Act, 1906. Wallaces, Limited, have admitted their liability to pay compensation to Bradley's dependants and claim in the same proceedings indemnity from Thompson, McKay & Co., Limited, as third parties, under the provisions of s. 6 of the last-mentioned statute. The success of their claim depends, as I have said, upon their proving that Bradley's death took place in circumstances creating a legal liability in Thompson, McKay & Co., Limited, to pay damages to Bradley's personal representatives in respect of it.

The learned county court judge has decided that it did. He has found in the terms of the order which he has made that the injury to Bradley which resulted in his death "was caused by the said Thompson, McKay & Co., Limited, trespassing upon the premises of the said Wallaces, Limited, by bringing the said horse upon the said premises, and, further, by negligently leaving the said horse unattended." The appellants Thompson, McKay & Co., Limited, have to satisfy this Court that neither of these findings can be supported.

It is, I think, convenient for the sake of clearness to state, as briefly as may be, the material facts as I understand them. Wallaces, Limited, the respondents to this appeal, have a factory at Huddersfield. A part of the premises consists of a large glass-roofed yard, on two sides of which are platforms which are used for loading and unloading waggons. Stables adjoin the yard on one side, and on another side is an entrance from a busy thoroughfare, called St. John's Road. The surface of the yard is made of concrete, more or less slippery, and slopes from the

platforms to the centre. On the morning of December 30, 1912, a cart of Thompson, McKay & Co., Limited, went with a consignment of eggs to the respondents' warehouse. It was in charge of a carter named Marsh. The carter was under orders, after delivering the eggs at Wallaces, Limited's place, to take other goods, which had been loaded upon the cart, to Messrs. Hopkinson, whose premises were at some distance from Wallaces, Limited's warehouse. The cart on its way to Wallaces' yard was in charge of a carter named Marsh, and he was accompanied by another carter named Rhodes, also in the service of Thompson, McKay & Co., Limited, who had a chain-horse which would be harnessed, as a chain-horse, to the cart only after it left the respondents' yard, in order to assist in drawing the cart up a steep bit of road somewhere on the way to the premises of Messrs. Hopkinson. Marsh and Rhodes with the loaded cart and the chain-horse reached the yard of the respondents about 11.30 in the morning, and entered the yard. Marsh wanted Rhodes' help to scotch the wheel of the cart, when it was backed against one of the platforms, in order to discharge the goods intended for the respondents because, as I have said, the concrete surface of the yard was on an incline from the sides to the centre. In order to give the help required, Rhodes left the chain-horse standing in a corner of the yard, and went to scotch the wheel. The chain-horse seems to have stood quietly munching some straw where it was left; but, whilst Marsh was engaged in scotching the wheel of his employers' cart, the deceased man Bradley, who was in the service of the respondents, came out of the stable adjoining the yard with a horse, and proceeded to back it between the shafts of a waggon of the respondents; and in doing so came near to the chain-horse, and slightly touched its tail with his shoulder. The horse lashed out behind and kicked Bradley, knocking him down and causing bodily injuries which occasioned his death. There was no suggestion that the horse was known to kick human beings, or to be otherwise vicious. It was found as a fact by the county court judge, and his finding must be accepted as conclusive on the point, that there was no negligence on Bradley's part in coming so close to the horse and touching it as he did.

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The learned county court judge has held that the death of Bradley occurred in circumstances which rendered the appellants legally liable in damages to Bradley's personal representatives, for that is what s. 6 requires, on two grounds: first, that his death was caused by the appellants trespassing in the yard by bringing the horse there; and, secondly, that Bradley's death was caused by their servant Rhodes' negligence in leaving the horse unattended. I am of opinion that on neither ground can his judgment be sustained.

I will deal with the trespass point first. It is not necessary to decide the matter, but I have considerable doubt whether Rhodes and the chain-horse, or either of them, were, whilst in the yard, in law trespassing there. It is quite true that Wallaces, Limited, were never asked by the appellants to permit Rhodes to bring into the yard the chain-horse in charge of which he accompanied the cart, and to remain with it in the yard whilst the cart, to which it was to be attached after leaving the yard, was there delivering at the platform the consignment of eggs. I cannot help thinking that the directors or the manager of Wallaces, Limited, would have been somewhat astonished, if a request had been made, that the appellants should think it necessary to make such a request. Neither Garside, the ware-houseman, who seems to have been in a position of some authority there,—for he is asked by the respondents' counsel and answered the question whether the respondents had ever given the appellants authority to bring a led horse into the yard—nor any other of the respondents' servants employed in the yard, made any objection to the horse being brought into and remaining in the yard. I doubt whether in all the circumstances the appellants ought not to be regarded in regard to the horse as licensees and not as trespassers in the yard. Of course if Rhodes had been told by the respondents or their servants not to bring the horse into the yard, or had been told, after it had been brought in, to take it out, and had not complied with such a request, there would have been a trespass. No such request was in fact made.

Let it be assumed, however, that in bringing the horse into the yard the appellants became, in point of law, trespassers upon

the land of the respondents. What is the legal result? That, if the horse did damage to the respondents, the owners of the land, the appellants would have to pay for it; not that injury done by the horse, not known by his owners to be vicious, kicking a third party on the premises, is, because the horse is a trespassing horse, an actionable wrong for which that third party can sue. *Cox v. Burbidge* (1), a decision in the year 1863 of a strong Court consisting of Erle C.J., Williams J., Willes J., and Keating J., which has, so far as I am aware, never been overruled or questioned in any subsequent case, clearly establishes this as the law. It is not a natural or ordinary consequence of a horse which has shewn no vicious propensity being improperly on the land which is not land belonging to its owner that it should, when there, kick human beings without provocation. In the cases of *Lee v. Riley* (2) and *Ellis v. The Loftus Iron Co.* (3), which stand, as it were, on the other side of that which is sometimes a rather narrow border line, the damage done to the owner of the property on which the horse trespassed was held, upon the facts, to be a natural consequence of the trespass. The learned county court judge, if, as I hope, I follow his line of reasoning, seems to have thought that, directly you have a horse in a position which renders his owner constructively a trespasser, every damage done in any way by the horse to any person or to the property of any person is an actionable wrong. I venture to think that such is not, and never was, the law.

The second ground of the appellants' liability, as found by the county court judge, is negligence, the negligence consisting in Rhodes leaving the chain-horse unattended whilst he was engaged in scotching the wheel of the cart. An act or omission can constitute a cause of action under the head of negligence only where it is proved that the act or omission caused the injury complained of. You must be able to trace the injury as an effect to the act or the omission which is alleged to be negligent. In the present case, the negligent conduct upon which the judgment is expressly based is Rhodes' conduct in leaving the horse, as the

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(1) 13 C. B. (N.S.) 430.

(2) 18 C. B. (N.S.) 722.

(3) L. R. 10 C. P. 10.

C. A. learned county court judge terms it, unattended. If it had been
1913 shewn by the evidence that the mischief done had been caused
by the horse not being attended, that is not having some one to
hold or to stand by its head, as, for instance, would have been
the case if the mischief to persons or property in the yard had
been caused by the horse being left free to go where it chose and
his moving about accordingly, the necessary connection would
have been established. But there is not upon the evidence in
this case the necessary connection between the horse being, in
the language of the learned county court judge, unattended, and
the happening of the accident to Bradley. When it kicked
Bradley it was standing in the corner in which it had been put,
and was there peacefully munching straw. It most unfortunately
chose to kick suddenly with its hind legs when Bradley was close
to it and slightly touched its tail with his shoulder. It is not
suggested by any witness, nor I suppose could it be suggested,
that any amount of attending to it on the part of Rhodes would
have prevented or interfered with this movement of its hind legs.
I may add, as being in itself some confirmation of the view that
there was really no connection between the horse being un-
attended and the accident which took place, that the poor man
who was killed must have seen, as other servants of the respon-
dents in the yard in fact saw, the chain-horse as and where it
stood, unattended. He was himself a teamster, a man who
understood such matters, and he, without negligence, as the
learned county court judge has found in his judgment, evidently
saw no risk in approaching the horse as it stood and as he did.
Otherwise it is reasonable only to suppose that he would have
asked Rhodes or Marsh, or some other person in the yard, to
move it.

In my opinion, the question of negligence as well as trespass
fails, the judgment in the Court below must be reversed, and the
present appeal allowed.

SWINFEN EADY L.J. This is an appeal by Thompson, McKay
& Co., Limited, third parties, from an order of the county
court judge, who held that under s. 6 of the Workmen's Com-
pensation Act, 1906, the third parties were liable to indemnify

Wallaces, Limited, the defendants, against the amount awarded to the dependants of George Bradley, deceased, a workman in the service of Wallaces, Limited, who died from the effects of an accident arising out of, and in the course of, his employment.

The question is whether the injury for which compensation was payable under the Workmen's Compensation Act by Wallaces, Limited, was caused under circumstances creating a legal liability in some person other than Wallaces, Limited,—that is to say in Thompson, McKay & Co, Limited,—to pay damages in respect thereof.

The facts are extremely simple. The third parties were delivering goods to the respondents from a lorry which was standing in the respondents' glass-roofed yard. The lorry also contained goods for another person living up a hill, and an extra chain-horse was brought by a servant of the third parties to the respondents' yard, for the purpose of being attached to the lorry to assist in dragging it up the hill to the residence of the next consignee. This chain-horse was left unattended in the yard by the servant of the third parties while he went to assist the carman of the lorry in scotching the wheels of the lorry, which was being backed up a slope in the defendants' yard. Meanwhile the deceased workman led out a horse belonging to the respondents from their stable, in order to harness it to a cart; there was little room in which to manœuvre this horse, and in turning round with it, to back it to the cart, the man's shoulder just touched the tail of the chain-horse; this horse kicked out immediately and killed the deceased.

The county court judge found that the horse was a trespasser, that is to say that no permission had been given by the respondents to the third parties to bring it to or leave it in their yard; that the servant of the third parties was negligent in leaving the horse unattended, and going to help the driver of the lorry; and that there was not any contributory negligence on the part of the deceased.

Notwithstanding these findings, the third parties contend that there is not any legal liability on their part to pay damages in respect of the death of the workman. Their point is a short one. They contend that the injury to the deceased was not the

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 1913 the chain-horse or of the negligence of their servant in charge of
 it. It was admitted that there was no evidence to shew that the
 horse was a vicious horse or had ever kicked before.

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The case resolves itself into this. Accepting the finding that the horse was a trespasser, and the servant of the third parties negligent in leaving the horse unattended, was the injury to Bradley such a result as might reasonably have been expected? Expressing it in another way, was the injury to Bradley so nearly or certainly enough connected with the trespass or negligence as to give him a cause of action? It was said by Erle C.J. in *Cox v. Burbidge* (1): "The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbour's corn or pasture. For a trespass of that kind, the owner is of course responsible. But if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has." That means that the party injured has no remedy unless the scienter can be proved. And again: "It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature, which is altogether contrary to the usual habits of the horse, without more." In that case a horse on the highway had kicked and very severely injured a child playing there. And again in the same case Willes J. said (2): "The important circumstance in this case is that the act was not in accordance with the ordinary instinct of the animal, which was not shewn to be of a mischievous disposition. . . . It comes round, therefore, to the question whether the owner is liable for an act of this sort done by an animal not of a naturally vicious character, and which is not found to have been accustomed to commit such mischief." The Court in that case made absolute the rule to enter a nonsuit, on the ground that on the facts proved there was no case of actionable negligence to go to the jury. This case, decided fifty years ago by a unanimous judgment of the Court of Common Pleas, settled the law on the subject.

In the present case, the negligence found by the county court

(1) 13 C. B. (N.S.) 430, at p. 437.

(2) *Ibid.* at p. 441.

judge is leaving the horse unattended. But no connection is shewn between this and the accident. It was not even sought to be established that if the head of the chain-horse had been held at the time in question, or if the horse had not been unattended, he would not have lashed out with his heels just the same when Bradley brushed by his tail. It was not attempted to be shewn that it was the negligence which occasioned the mischief.

The guiding principle is that a person is liable only for the natural and probable consequences occasioned by or resulting from trespass or negligence, and injury suffered must be brought within this degree to give rise to a cause of action. This is well illustrated by the leading case of *Metropolitan Ry. Co. v. Jackson* (1) in the House of Lords, where the plaintiff's thumb was crushed by a railway porter quickly shutting the carriage door while the plaintiff was standing up to keep out intruders from a railway carriage already overfull. The House of Lords unanimously held that, assuming the failure to prevent overcrowding to be negligence on the part of the railway company, the hurt suffered by the plaintiff was not sufficiently connected with such negligence to give him a cause of action.

So in the present case, the injury to the deceased was not sufficiently connected with the trespass or negligence to be the natural or probable result or consequence of it.

In my opinion, the appeal of the third parties should be allowed.

Appeal allowed.

Solicitors: *D. H. Davies ; Rawle, Johnstone & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

(1) (1877) 3 App. Cas. 193.

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[IN THE COURT OF APPEAL.]

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TYNE TEES SHIPPING COMPANY, LIMITED *v.* WHILOCK.*July 8.*

Employer and Workman—Compensation—Weekly Payments—Recorded Agreement—Review—Jurisdiction—“If any question arises”—Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3; Sched. I., clauses 16, 17—Workmen’s Compensation Rules, 1907—1911, rr. 8, 9; Appendix A, Form 5.

A workman having met with an accident within the meaning of the Workmen’s Compensation Act, 1906, an agreement was made between him and his employers whereby they admitted liability and total incapacity and agreed to make him a weekly payment as compensation. They subsequently applied for a review of the weekly payments and asked that they should be terminated on the ground that the incapacity of the workman had ceased. The county court judge held that no question had arisen between the parties when the application was commenced, therefore he had no jurisdiction to entertain it:—

Held, that the existence of a dispute between the parties was not a condition precedent to an application to review under Sched. I., clause 16.

APPEAL from an award of the judge of the Whitechapel County Court sitting as arbitrator under the Workmen’s Compensation Act, 1906.

On August 27, 1909, Thomas Whilock, whilst working in the employment of the Tyne Tees Shipping Company, met with an accident.

On February 4, 1910, an agreement was come to between him and his employers as follows:—

“1. The employers admit (a) that the workman was in the employment of the employers on the date above mentioned, and that on that date personal injury was caused to the workman by accident arising out of and in the course of his employment. (b) That from the date of the said accident to the present time the workman has been totally incapacitated for work and that such incapacity is continuing. (c) That the workman is a workman to whom the above mentioned Act applies and that the employers are liable to pay compensation to the workman in accordance with the provisions thereof.

“2. The employers agree to pay to the workman the sum of

one pound every week from the date of the said accident in accordance with the above mentioned Act."

This memorandum was duly recorded.

On January 1, 1913, the employers applied for arbitration with respect to the review of the weekly payments due under the agreement, and asked for termination of the payments as from December 12, 1912, on the ground that the workman was not and had not been since that date incapacitated from following his employment by reason of the injury. The workman gave notice that he would submit that the arbitrator had no jurisdiction to entertain the application on the grounds that no question had arisen as to the liability of the employers or as to the amount or duration of the compensation payable and that the employers issued their application without warning or previous notice of any kind. He added that without prejudice to his defence as thereinbefore set out he would oppose the application on the ground that he had not recovered and was not able to resume his work; and he asked for a suspensory award to keep open his rights.

The learned county court judge held that no question had arisen between the parties when this application was commenced, and therefore he had no jurisdiction under the Act; and he dismissed the application.

The employers appealed on the grounds (1.) that the learned judge misdirected himself in law and was wrong in holding that no question had arisen between the parties when the said application was commenced and that he had therefore no jurisdiction under the Act; (2.) the learned judge was wrong in law in holding that he had no jurisdiction to entertain an application for review of weekly payments.

C. Doughty, for the appellants. It is not necessary that any question should have arisen before an application of this kind. By s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906 (1),

(1) Workmen's Compensation Act, 1906, s. 1, sub-s. 3: "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the

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"If any question arises in any proceedings" under the Act it is, "if not settled by agreement," to be settled by arbitration. That gives the judge seisin of the matter. By Sched. I., clause 16, a weekly payment may be reviewed at the request either of the employer or the workman and the amount of payment shall "in default of agreement" be settled by arbitration. By r. 8, sub-r. 1, of the Workmen's Compensation Rules, 1907—1911, an application for the settlement of any matter by arbitration shall not be made unless some question has arisen and has not been settled by agreement, and sub-rr. 2 and 3 specify the requisites for and the

amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act."

Sched. I., clause 16: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Rule 8: "Request for Arbitration.—(1.) An application for the settlement of any matter by arbitration shall not be made unless and until some question has arisen between the parties, and such question has not been settled by agreement.

"(2.) Where any question has arisen and has not been settled by agreement, an application for the settlement of the matter by arbitration shall be made by the applicant filing with the registrar a request for arbitration, intitled in the matter of the Act and in the matter of the arbitration, which request shall state concisely the question which has arisen, and shall, with the subsequent

proceedings thereon, be recorded in the special register hereinafter mentioned.

"(3.) Particulars. — Particulars shall be appended or annexed to the request, containing—

"(a) A concise statement of the circumstances under which the application is made, and the relief or order which the applicant claims;

"(b) The date of service of notice of the accident on the employer, or, if such notice has not been served, the reason for such omission; and

"(c) The full names and addresses of the respondents and of the applicant, and of his solicitor, if the proceedings are commenced through a solicitor."

Rule 9: "Forms of Request and Particulars. Forms 1 to 11.—(1.) The request and particulars shall be according to such one of the forms in the Appendix as shall be applicable to the case, with such modifications as the nature of the case may require.

"(2.) A copy of the notice of the accident shall be appended or annexed to the particulars. If this rule cannot be complied with, the reason for the omission shall be stated in the particulars."

particulars to be furnished on applications. By r. 9 applications are to be made in the forms given in the Appendix. Form 5 is the form which applies to applications for review and it omits the statement which is to be found in all the other forms that "a question has arisen." Therefore, although a dispute is a necessary preliminary to original applications, the existence of a dispute is not a condition precedent to an application to review. If a dispute has to be established employers will be greatly embarrassed. Disputes as to duration may arise on original applications and also on applications to review: *Payne v. N. Fortescue & Sons, Ltd.* (1)

[KENNEDY L.J. referred to *Field v. Longden & Sons.* (2)]

Sched. I., clause 16, implies that there has been a change of circumstances: *Higgins v. Poulson.* (3) All the cases refer to original applications.

[COZENS-HARDY M.R. referred to *Summerlee Iron Co., Ltd. v. Freeland.* (4)]

A county court judge cannot terminate an agreement: *Taylor v. London and North Western Ry. Co.* (5)

A. J. David, K.C., Horace Fenton, and Horace Samuel, for the workman. To give the judge jurisdiction there must be a dispute between the parties. It is a condition precedent to any proceeding under this Act that there should be some dispute between them. *Field v. Longden & Sons* (2) was an original application, but the Master of the Rolls said (6) that if the employers denied the existence of an agreement that would be a dispute, and a request for arbitration did not in itself create a question. This is within the express terms of s. 1, sub-s. 3, "If any question arises in any proceedings under this Act." That sub-section provides the whole of the machinery, and this is a question of duration. This is also within the very words of r. 8, "An application for the settlement of any matter by arbitration." There must be a dispute which has not been settled by agreement, and there is no dispute here; so the judge had no jurisdiction to hear the application. There is no difference for this purpose

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(1) [1912] 3 K. B. 346.

(2) [1902] 1 K. B. 47.

(3) [1912] 2 K. B. 292.

(4) [1913] A. C. 222.

(5) [1912] A. C. 242.

(6) [1902] 1 K. B. at p. 54.

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 1913 v. *Oldnall Colliery Co.* (1); *Sweeney v. Gourlay Brothers & Co.* (2);
 TYNE TEES *Jones v. Great Central Ry. Co.* (3) Rule 10 shews that r. 8 was
 SHIPPING intended to apply to applications to review. Arbitration is to
 COMPANY, be the last resort of persons who are unable to agree. No person
 LIMITED may rush into arbitration till a question has arisen: *Kennedy v.*
 v. *Caledon Shipbuilding Co.* (4)
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C. Doughty, in reply, referred to r. 47, sub-r. 3, and *Radcliffe*
 v. *Pacific Steam Navigation Co.* (5)

COZENS-HARDY M.R. This is a question, the raising of which at the end of so many years I confess surprises me, but there is no doubt a good deal of difficulty in the case. It is one which has merited the arguments which we have heard, and the disposing of it has necessarily taken up some time, but we have arrived at a conclusion satisfactory to our own minds. The policy of the Act, as has been laid down, was not that the workman should at any moment have a right to take into Court an employer who has been paying him a share of his wages as compensation, to which under the Act he is entitled. It has been again and again said that the jurisdiction given by s. 1, sub-s. 3, of the Act presupposes the existence of a question which has arisen in the proceedings. Those questions are defined to be: Is the man a workman to whom the Act applies? What is the amount of the compensation to which he is entitled; or, what is the duration of the compensation to which he is entitled? The word "duration" seems to me to mean that the employer admits the accident, he admits the right to compensation from the accident, and he says "The period for which I am bound to pay compensation has expired—the right to the award has gone by and the right to compensation has come to an end." Now, where is this provision, s. 1, sub-s. 3, to be found? It is to be found in the section dealing with the original application. Obviously, on the face of it, it is nothing more than that. What is the effect of an award?—and when I say "award" I mean

(1) (1903) 114 L. T. Newspaper,
 284.

(2) (1906) 43 S. L. R. 690.

(3) (1901) 4 W. C. C. 23.

(4) (1906) 43 S. L. R. 687.

(5) [1910] 1 K. B. 685.

also a registered agreement which is exactly the same, I do not draw any distinction between them. It is this: an award of so many shillings per week during incapacity, it being inherent in the award that there is liberty to either party to apply to review or terminate under Sched. I., clause 16. That being so, I see no ground for the contention that an application under clause 16, which is really an application for liberty to apply inherent in the award itself, should imply the necessity for a dispute to have arisen between the parties before the application was made. I look at the Rules, which are part of the Act, the statute in force. What does r. 8 say? Rule 8 says this: "An application for the settlement of any matter by arbitration shall not be made unless and until some question has arisen between the parties, and such question has not been settled by agreement." They are the very words of s. 1, sub-s. 3, and if I am right in my construction of s. 1, sub-s. 3, they carry me no further. Then by sub-r. 2, "Where any question has arisen and has not been settled by agreement, an application for the settlement of the matter by arbitration shall be made by the applicant filing with the registrar a request for arbitration, intituled in the matter of the Act and in the matter of the arbitration, which request shall state concisely the question which has arisen, and shall, with the subsequent proceedings thereon, be recorded in the special register." Then sub-r. 3 of r. 8 gives certain particulars upon which nothing really turns except this: that they do rather strongly support the view that that sub-rule applies to the original application. The request, amongst other things, is to state "the date of service of notice of the accident on the employer, or, if such notice has not been served, the reason for such omission"; again throwing you back to the original application and assisting the view that r. 8 itself is only dealing with the original application. When I come to r. 9, this matter seems to me to be made more clear. "The request and particulars shall be"—not may be—"according to such one of the forms in the Appendix as shall be applicable to the case, with such modifications as the nature of the case may require." If I look at the forms I see that all the others contain an express form stating the question which has arisen. But

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Form 5, which is the form applicable to the review clause, contains a distinct and deliberate omission of that which in r. 8, sub-r. 2, is necessary to be stated, namely, the question which has arisen. I think, therefore, that the rules themselves confirm the view I take on the question of construction, that this application need not be necessarily preceded as a matter of jurisdiction by a statement that a dispute has arisen. I should be very unwilling to come to an opposite view. One cannot forget that this Act and the earlier one, which is exactly identical with this one, have been in operation for many years, and, so far as my experience goes, Form 5 has invariably been used. If the argument which is now suggested is right, Form 5 is ultra vires and invalid, because it does not state the question which has arisen. I hesitate to take such a view. I think, with due respect to the learned judge, that he was wrong, and that this is not a case in which there has never been any dispute between the parties. There has. That dispute between the parties was settled subject to liberty to apply, and that liberty to apply does not fall within s. 1, sub-s. 3.

For these reasons I think the decision of the county court judge was wrong and that this appeal must be allowed.

KENNEDY L.J. I have come to the same conclusion. I do not think, having regard to the enactments which have been referred to, that the case is an easy one, nor do I think that any hardship would arise if it were the true effect of the legislation that a request for an alteration of the amount of the weekly payments had to be preceded by a dispute. On these applications it is certainly open to the employer to ask for not only a reduction of the amount of the weekly payment from the date of the hearing, but he is entitled, as I think this Court has decided, to get a reduction at any rate from the date of the application if the improvement in the workman's condition is shewn to have existed at that date. Although I am not sure whether there is a decision to that effect, it has certainly not been decided that, if the claim for review gave precisely an earlier date than the date of application as the date on which the incapacity had ceased or

been diminished, he might not get an order for reduction as from that earlier date. But be that as it may, I agree with the Master of the Rolls in the conclusion to which we ought to come quite apart from any question of resulting advantage or disadvantage to either of the parties. We have simply to construe this Act of Parliament and apply it with its rules, schedules, and forms.

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Now that which is relied upon is r. 8 of the Rules: "An application for the settlement of any matter by arbitration shall not be made unless and until some question has arisen between the parties, and such question has not been settled by agreement." We must read that with two other provisions—first of all with the statutory power to apply for a review; and secondly with the forms, in which there appears to be very clearly a difference in form between what I may call applications for the payment of compensation and applications to review, such as the present application was. Upon the whole, I think the true view is that the application to review does not come under the head of a question which has to be settled or matter to be settled by arbitration under r. 8, sub-r. 1, because an application for review is an application to bring before the Court a matter which is not one as to which any new question arises. It is the exercise of a power to bring before the Court something which the Act itself reserves when the original award is made, or an agreement is recorded; something which may be brought to the notice of the Court respecting the award in the one case or the agreement in the other case, the agreement having the same effect as the award. I think that that is on the whole the better view. It is very much like the case of parties coming before the Court on leave to apply in some matter which has been the subject of a judgment; and the fact has been pointed out that the forms state in the case of an original or initial application for arbitration that a question has arisen, and set out that question, and omit that statement in the case of the form given for an application to review. A question has to be dealt with, and before the parties come before the Court and raise the question by application they must shew that a question has arisen, because it is a condition precedent to

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the right to apply for arbitration. But here the applicants, who are the employers, can say "The matter as to which we come before the Court is a matter which by the express terms of the Act we had, by virtue of the settlement of the original question for compensation, a right to have reviewed." I think that that is the sounder view, and I do not think that one ought to leave entirely out of sight in favour of that conclusion the fact that without question for many years that view has been practically acted upon.

I think, therefore, that this appeal ought to succeed. I will only add that it does not seem to me that the cases which seem to have been successfully adduced in argument before the learned county court judge really bear on this case, it being admitted that they referred to original applications for compensation.

SWINFEN EADY L.J. I agree that the appeal should be allowed. The proceedings under the Act and under the Rules are intended, either by agreement between the parties out of Court or by arbitration and award, to fix once and for all the respective positions of the employer and the workman, to determine the liability to pay compensation, and to fix the amount. But in respect of a weekly payment fixed until further order the Rules contemplate that that further order may be obtained from time to time. In my judgment assistance in arriving at the true construction of the Rules is derived from considering together Sched. I., clauses 16 and 17, having regard to Form 5, the form in question. It has been pointed out in respect to all the other forms that they contain a reference to the question that has arisen. Form 5 omits that. Form 5 is applicable not only to applications to review under clause 16, but to applications to review under clause 17, and Form 5 is a "form of application for arbitration with respect to the review, termination, diminution, increase," all of which are under clause 16, "or redemption of a weekly payment," which is under clause 17. It is to my mind manifest that an application under clause 17 may be made, and it is contemplated that it should be made, without any question having arisen between the parties previously. When the language of the

rule is looked at, and especially the language of the proviso at the end, it seems to me to make that clear. Clause 17 provides that "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer,"—in this case of course it is only the employer who can apply—"be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent"—then there is a reference to fixing the amount—"and as in any other case may be settled by arbitration under this Act," and the lump sum may be invested or otherwise dealt with. Then comes this proviso: "Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum." That is to say that in this case the employer may apply within the clause to redeem; it is not necessary that any previous questions should have arisen between him and the workman; the employer may apply to redeem, but that application is not to prevent any agreement, either before the application or during the application, as to redemption by payment of a lump sum. Under clause 16 the right to apply for a review is given both to the employer and to the workman, and it is to review upon the footing that the amount of the weekly payment may be ended, diminished, or increased within the limit of the maximum. Then the amount of payment shall in default of agreement be settled by arbitration. The language is somewhat similar: either party may apply for a review, and having applied for the review, if the parties agree, it is not necessary to go to arbitration; if they do not agree the matter can be settled by arbitration. It seems to me that that is the true view, and it is very much confirmed by r. 9, sub-r. 1, which says that "The request and particulars shall be according to such one of the forms in the Appendix as shall be applicable to the case." There is only one form in the Appendix applicable to a review or redemption, and that is Form 5, and that form contemplates an application being made without stating that any question has arisen between the parties in regard to it. In my opinion the application to review may be made at the request of either party at any time and without any previous correspondence or dispute or any question

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C. A. having arisen and being in any way formulated between them.
 1913 I agree that the appeal should be allowed.

Appeal allowed.

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Employer and Workman—Compensation—Weekly Payments—Redemption of Employer's Liability—Optional Award—Permanent Incapacity—Onus of Proof—"May"—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., clause 17.

A workman met with an accident within the meaning of the Workmen's Compensation Act, 1906, which resulted in the loss of his left hand. He was awarded 15s. 4d. a week compensation; and the employers subsequently applied for an arbitration for the redemption of this payment. The county court judge held that permanent partial incapacity was proved and awarded that the weekly payments "may be redeemed" on payment by the applicants of 613*l.*, namely, 75 per cent. of thirty years' purchase. The workman appealed against the optional form of the award, and the employers appealed on the ground that the judge was not compelled to award that amount, that the incapacity was not permanent, and that the onus of proving that the incapacity was not permanent was not on them:—

Held, that the judge must make an award for a lump sum which could be enforced as a judgment; that the word "may" must be struck out of the award; and that there was evidence on which the judge was justified in finding that there was permanent partial incapacity.

Dictum of Farwell L.J. in *Calico Printers Association v. Higham* [1912] 1 K. B. 93, 104, that the onus of proving permanent incapacity was on the person alleging it, doubted.

APPEAL from an award of the judge of the Ashton-under-Lyne County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On March 28, 1912, Robert Booth, a stripper and grinder in the employment of the Calico Printers Association, Limited, was at work at Wellington Mills, Ashton-under-Lyne, when his left hand was caught in a machine and four of his fingers were

taken off, with the result that his arm had to be amputated two and a half inches above the wrist.

On June 13, 1912, an award was made on the workman's application giving him 15s. 4d. per week from the date of the accident.

On February 6, 1913, the employers requested an arbitration "with respect to the review and redemption" of the weekly payments and asked for redemption. The workman answered that he was permanently incapacitated from following his employment as a stripper and grinder or any other employment whereby he could earn the weekly wages he earned prior to the accident. He admitted the right of the employers to redeem the weekly payment to him of 15s. 4d., but said that the redemption should only be by payment of a sum of such amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for himself equal to 75 per cent. of the annual value of the weekly payments of 15s. 4d. Medical evidence was given that the wound was soundly healed, the stump well covered, the muscular power remarkably good, and that the arm was ready for an artificial hand or hook. A witness, David Roberts, was also called, who deposed that he had himself lost a hand and subsequently earned large wages in various capacities. The workman Booth said that he had endeavoured to get work in many different ways, but had failed. The learned county court judge said that on the evidence he could not assume that the workman would be able to get work. The evidence of Roberts's case was distinguishable and referred to a period before the passing of the Workmen's Compensation Acts. His Honour declined to allude to cases in his own experience and held that there was a stability about the weekly payments, and he could not say that there was any practical possibility of the payments being increased or diminished, although he would be inclined to say so if the matter was left to his own personal knowledge and experience. This was therefore a case of permanent partial incapacity, and he awarded that the weekly payments "may be redeemed by the applicants, the Calico Printers Association, Limited, at the sum of 613l." (75 per cent. of thirty years' purchase). His Honour also said

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The workman appealed on the ground that the award left it optional to the employers either to redeem the weekly payments by the payment of 613l. or not to redeem at all.

The employers served notice of a cross-appeal and asked for an order that the weekly payments might be redeemed on payment of 300l. instead of 613l. on the grounds that the learned county court judge was wrong in law in holding that he was compelled to award that the lump sum required to redeem the said weekly payments was of such an amount as would if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank purchase an annuity for the respondent equal to 75 per cent. of the annual value of the said weekly payment; that he was wrong in holding that the incapacity of the workman was permanent, and in holding that the onus was upon the employers of proving that the incapacity of the workman was not permanent.

Sanderson, K.C., Wingate-Saul, and L. J. Swallow, for the workman. Upon an application to redeem weekly payments under Sched. I., clause 17 (1), of the Workmen's Compensation Act, 1906, the employer is not entitled to an award in such a form that he can take it up or not as he pleases. This point was left open in *Calico Printers Association v. Higham*. (2)

(1) Sched. I., clause 17: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to

seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum."

(2) [1912] 1 K. B. 93.

The application of the employers is a request for an arbitration—Workmen's Compensation Rules, Form 5—and the award ought to settle the amount in such a way that it can be enforced as a county court judgment: Workmen's Compensation Rules, 1907—1911, r. 28. It cannot be so enforced if the award is made in such a form that the employer can take it up or reject it at his option.

[COZENS-HARDY M.R. It would be unfair that the workman should be put to the cost of an application for redemption and get no benefit from it.]

That point was brought out in *Castle Spinning Co. v. Atkinson*.⁽¹⁾ That case is directly applicable here, because the words of Sched. I., clause 13, of the Workmen's Compensation Act, 1897, are, so far as material, the same as those of Sched. I., clause 17, of the present Act. It was said there by Lord Collins that the Legislature did not contemplate and had not provided for an experiment by the employer as to whether the sum which he was prepared to pay for redemption was such a sum as the workman ought to accept. The employer must be prepared to pay whatever sum the arbitrator may think fit. That applies equally to this case. But if the award is allowed to stand in this form the employer need not "be prepared to pay" the sum awarded.

The county court judge in this case thought he could not force the employer to redeem, because the Act says the liability for the weekly payment "may" be redeemed. The Legislature did not intend that the application to redeem should be merely to fix an amount at which the employer might or might not redeem as he chose; it was to be an unequivocal application to redeem, and the county court judge has no power on such an application to make an award which is unenforceable.

Where a workman has exercised his option to claim compensation under s. 1, sub-s. 2 (b), he cannot, if he does not like the result, take proceedings independently of the Act. So here, the employer, having exercised his option by applying for redemption, cannot be put in a position to withdraw by obtaining an award in such a form that he may go on with it or not as he pleases.

(1) [1905] 1 K. B. 336.

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C. A. *Sankey, K.C., and Adshead Elliott*, for the employers. The
 1913 word "may" in Sched. I., clause 17, does not mean "must";
 CALICO it gives a right to the employer to redeem the weekly payments
 PRINTERS if he is so minded. The award is correct, for it exactly follows
 ASSOCIATION, the language of the Act. The word "may" is also used and is
 LIMITED, clearly optional in Sched. I., clause 16. The scheme of the Act
 v. is that where a weekly payment is in existence it may be reviewed
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 "may" has the same meaning in both clauses. It has always
 been construed to mean that the Court has a discretion.

[COZENS-HARDY M.R. We are bound by the decision in
Castle Spinning Co. v. Atkinson. (1)]

This was an application for arbitration and not an application
 to redeem on the basis of permanent incapacity. In *Castle
 Spinning Co. v. Atkinson* (1) the application was under Sched. I.,
 clause 13, of the Act of 1897, which did not fix automatically the
 amount of the lump sum to be paid for redemption. The
 employer had to be prepared to pay whatever the arbitrator found
 to be the right amount. In the present case the judge had no
 jurisdiction to give a completed award that the employers must
 pay so much. He could only determine whether or not the
 incapacity was permanent. As soon as he had done that he was
 functus officio. The amount was fixed automatically and the
 employers were not bound to redeem. The present enactment
 draws a distinction between permanent incapacity and all other
 cases and the jurisdiction is restricted. The judge has now no
 jurisdiction, where permanent incapacity is proved, to settle the
 amount to be paid. On this construction of clause 17 everything
 harmonizes, and the decision in *Castle Spinning Co. v. Atkinson* (1)
 is right because at that time the judge had to decide all
 questions.

The alteration made by Sched. I., clause 17, is that the amount
 is now automatically fixed. The judge can only award that there
 is or is not permanent incapacity; he cannot make an award of
 a certain amount which will be enforceable as a county court
 judgment. This is an application on the ground that the
 incapacity is not permanent and is a proper application on that

ground. If the employers had been proceeding on the ground of permanent incapacity they would have asked the judge to find whether the incapacity was permanent, and possibly the age of the workman, but not to fix the amount of the redemption money.

Sandersen, K.C., in reply, was stopped by the Court.

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COZENS-HARDY M.R. This is an appeal which raises an interesting and important point under the Act. What is this application in respect of which there is an appeal to us? It is beyond doubt an arbitration under the Act. The form is headed, "In the matter of the Workmen's Compensation Act," and "And in the matter of an arbitration between the Calico Printers Association, Limited, and Robert Booth." What is the relief sought? Again, there is not the smallest doubt about that. The relief sought is the redemption of the weekly payment. That specifically refers to clause 17 of the First Schedule, which provides that an application may be made not by the workman, but only by the employer. To whom? To the arbitrator or committee or whoever it may be. It must be made to the Court, and the Court has to consider, first, is the incapacity permanent, a phrase which undoubtedly gives rise to a good deal of difficulty, upon which we endeavoured to throw some light in *Calico Printers Association, Ltd. v. Higham* (1), but it does not arise here for discussion. It may be permanent or it may not. The arbitrator has then to make an award on the application which has been submitted to him as arbitrator by the employer, and is to award according to the directions of this section. The award in the first branch of the case, that is to say, if the incapacity is found to be permanent, is fixed by reference to 75 per cent. of what would have to be paid for an immediate life annuity to the National Debt Commissioners through the Post Office Savings Bank. In that case the arbitrator would have to find two things, namely, that the incapacity is permanent, and then what is the amount. There may be a dispute about that. It is not every workman whose age can be proved without investigation. It may well be there would be a serious matter to be decided on that hand. But whether that be so or not, whether the workman's

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age is proved to demonstration or admitted, the arbitrator ought, it seems to me, in his award, to insert the figure which is represented by the 75 per cent. of the amount required to purchase the annuity. But he may not find it to be permanent. What then is his duty? His duty is to award such a lump sum as he may think fit according to the circumstances of the case, as he finds them on the evidence.

I think that this case in principle has already been decided by the Court. I am not aware that the ingenious argument that we have heard from Mr. Sankey has been addressed to us before, but I think it has been decided by this Court. In the case of *Castle Spinning Co. v. Atkinson* (1), which was under the old Act, the Court were dealing with clause 13, which is in these terms: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned." In that case the employer applied for redemption and said, "May I redeem for a particular sum which the other side are willing to take?" The Court said, "That will not do; that is not a reference within the Act." Reading from the judgment of the Master of the Rolls, Lord Collins, he says: "It seems to me that the Legislature did not contemplate and has not provided for what may be called an experiment on the part of the employer as to whether the sum which he is prepared to pay for the redemption of the liability is such a sum as the workman ought to accept. If the employer desires to redeem the liability, he cannot make such an experiment, but must be prepared to pay whatever sum the arbitrator or county court judge may fix." And the other members of the Court, of whom I was one, took exactly the same view. I think, therefore, that the word "may," on which the first argument is based, is regulated by that case, besides which, apart from authorities, I have no doubt in my mind whatever that the word "may" in s. 16 was inserted to give jurisdiction to the Court to review in the

(1) [1905] 1 K. B. 336.

shape of ending, diminishing, or increasing, and that the word "may" is inserted in clause 17 to enable and justify the Court to entertain an application for the termination at the instance of the employer. But when that application is made, when that jurisdiction is invoked by the employer, it seems to me that the principle of *Castle Spinning Co. v. Atkinson* (1) must apply, and that it is wholly immaterial under which branch of the case the award is made. Mr. Sankey seems to think that he found some comfort from my judgment in *Calico Printers Association, v. Higham*. (2) I think if he looks at it a little more carefully he will not find any ground for that. Having discussed this section in some detail and pointed out that a broad distinction is drawn between an incapacity to work which is permanent and one which is not permanent, I said at p. 96, "The arbitrator has, if the incapacity is permanent, no discretion as to the amount. He cannot award less or more than 75 per cent. of the actuarial value"; but that seems to me to imply the assertion—and it is not necessary now, and I do not desire, to make a positive assertion—that he can award 75 per cent. of the value. Then there is another passage from which Mr. Sankey apparently gleaned some comfort, but which I do not think justifies it. It is on p. 97: "In my opinion the first duty of the arbitrator is, after hearing evidence, to arrive at a conclusion that the incapacity is or is not 'permanent' in the sense in which I have explained the word." That is the first duty, but Mr. Sankey's argument involves that it is the last duty of the arbitrator as well. In my opinion, there is no ground for that. An arbitrator, under an application by the employer to redeem a payment, must make an award for a lump sum, an award which can be enforced as a judgment, and it makes no difference whatever that there is a direction in the sense that in one event he is to award 75 per cent. of a sum ascertained in a particular way, and in the second event that he is not bound by any limitation of his discretion. For these reasons I think the appeal must be allowed and the award set aside.

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KENNEDY L.J. I am entirely of the same opinion. It seems to me that directly it appears on the face of the clause in the

(1) [1905] 1 K. B. 336.

(2) [1912] 1 K. B. 93.

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schedule that there may be an application to an arbitrator, it is pretty well decided that the award, which is to the effect that a weekly sum payable as compensation for personal injury may be redeemed, an award that the applicants, the Calico Printers Association, Limited "may" do so by paying a sum of 613*l.*, is not a good award. The parties went before him to decide, not whether or not there was to be leave to redeem by the employer, but whether or not there should be paid this or that sum, and the amount would depend, in the case of other than permanent incapacity, upon the judgment of the arbitrator, and is fixed at a sum which the law has fixed the method of determining if the arbitrator finds that there has been a permanent incapacity—subject to this extent to his judgment, that he must find the age of the employee in question. This workman had originally on June 13, 1912, obtained the award of the arbitrator for compensation under the Act, and by the terms of the first paragraph of that award the sum was awarded to him as a sum which was to continue "during the total or partial incapacity of the said Robert Booth for work, or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Act." Then under clause 17 the employers came forward and said "We wish to terminate this by redemption," and the only award which can be made, if permanent incapacity is proved, is an award of an amount fixed in accordance with a certain table depending upon the age of the applicant at the time. I have listened with great interest to the very ingenious argument put forward by Mr. Sankey to shew that this is a piece of legislation which is merely, as regards one part of it, to be a question of liberty to redeem, and, on the other part of it, is to be an order for redemption at a certain figure where the incapacity is not permanent. I confess, with great respect, that I am unable to follow the reasoning, and I concur with the judgment of the Master of the Rolls. The earlier judgment to which he has referred is, I think, looking at the language used by Lord Collins M.R. and the concurrence of his colleagues, fairly conclusive of the question raised here on the part of the employers.

SWINFEN EADY L.J. I am of the same opinion. It seems to me that full effect is given to the word "may" in the 17th clause of the First Schedule, when it is remembered that it is the employer, and the employer only, who is entitled to apply to redeem. "Where the weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed." It is not incumbent upon the employer to apply at all, but the option of applying is given to him. The second point taken by Mr. Sankey was that the application in the present case was for arbitration, and was not an application to redeem on the footing of permanent incapacity. That is partly so, no doubt. But what was it? It was an application to redeem. The point whether it was permanent incapacity or not was the point in dispute between the parties, but the application filed was an application for arbitration. Then paragraph 5 of the printed form of application is: "The relief sought by the applicant, whether termination, diminution, increase or redemption"; and the application was for: "Redemption of the weekly payment." That is what the employers were asking for—to redeem. Then the workman took up this position. He did not oppose redemption; he, too, was willing for redemption, but his answer was the contention that he was permanently incapacitated. He admitted the right of the applicants to redeem the weekly payment of 15s. 4d., but maintained that the redemption should only be by payment of such a sum as was provided by clause 17. So that it was an application to redeem, the workman taking up the position, "I am willing that there shall be redemption, but it must be on the footing of permanent incapacity," and upon that they went to arbitration. It seems to me that Sched. I., clause 17, when it says that the liability may, on application by or on behalf of the employer, be redeemed, means an application under the Act for a statutory arbitration. Then there is to be awarded a lump sum. In one case the amount of the lump sum is fixed by reference to the value of an annuity; in the other case it is to be settled by arbitration. But then it will be observed that the concluding words of clause 17 apply to the lump sum in each case, that is, whether it is fixed by reference

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to 75 per cent. of the value of his annuity, or whether it is the amount awarded by the arbitrator. In either case the lump sum may be dealt with: "such lump sum may be ordered by the committee or arbitrator or judge of the county court, as the case may be, to be invested, or otherwise applied for the benefit of the person entitled thereto." In my opinion, the true intent and meaning of the provision is that the application for arbitration should be at the option of the employer, but that when he applies and when the award is made, it is an award that is binding, and is capable of being enforced.

It was thereupon agreed without discussing the question of jurisdiction that the award should be varied by striking out the word "may."

Sankey, K.C., and *Adshead Elliott*, for the employers. The remaining point on the cross appeal is that there was no evidence of permanent incapacity. The onus of proving permanent incapacity is on the workman who alleges it: *Calico Printers Association v. Higham*. (1) The arbitrator is entitled to act upon his general knowledge—*Roberts & Ruthven v. Hall* (2)—and he ought to have done so in the present case. There is nothing here to shew that the weekly payments have arrived at a condition of stability.

Sanderson, K.C., *Wingate-Saul*, and *L. J. Swallow*, for the workman, were not called upon to argue this point.

COZENS-HARDY M.R. This is an appeal from a decision of the learned county court judge, who has held that the incapacity of the workman was permanent, within the meaning of the word in Sched. I., clause 17. That clause has been discussed by this Court in the case of *Calico Printers Association v. Higham*. (3) I do not think it is necessary or right for me to repeat what I there said, except just to refer to one sentence, but I will preface what I am about to say by this remark. The nature of the accident was this. A man has lost one of his hands, it was

(1) [1912] 1 K. B. 93, 104.

(2) (1912) 5 B. W. C. C. 331, 333.

(3) [1912] 1 K. B. 93.

amputated at some little distance above the wrist. He is a man of thirty years of age, and a man of good character, against whom there is no suggestion of malingering, a man whose wound has recovered as far as it can be, that is to say, there is no tenderness to speak of in the stump, and he has been provided with a hook, or some other contrivance, such as one-armed men use. It is also proved that he has, since his recovery,—because it is a recovery as far as circumstances permit—made most continuous, honest, and trustworthy efforts to obtain work, and he has found that he cannot do it. In those circumstances, those facts having been proved before the learned county court judge, he came to the conclusion that the incapacity was permanent within the language of that section. That the word “permanent” is one which creates a difficulty is quite plain. Every member of the Court in *Calico Printers Association v. Higham* (1) felt that. It is quite obvious that the county court judge must, to some extent, embark upon the realm of prophecy. But what is the problem which he must ask himself? What is he to prophesy about? Using my own words, “He must start with the assumption that the existing weekly payment is proper; but he must go further, and ascertain as best as he can whether that payment is likely to be proper during the rest of the man’s life. Is his condition stable; or is there a probability that he will get better or worse? If his condition is stable, the incapacity is ‘permanent’ within the meaning of the clause.” Then I pointed out that “The problem is difficult, no doubt; but it is not beyond the wit of man. So long as the arbitrator does not misdirect himself his conclusion of fact will not be interfered with.” In the present case I am bound to say I can see no trace of misdirection on the part of the learned county court judge. It is said that the learned county court judge intimated that if he could have his own way, if it came under the second part of the section and not under the first, he should give a smaller sum. But the learned county court judge was bound to do that which I have not the smallest doubt he did, decide the case according to the evidence brought before him, taking account, as he was entitled to do, of his general knowledge of the labour market; but I think he was

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quite right in saying "I cannot have regard to particular cases which have come before me in the past." That is something entirely different from his general knowledge of the labour market, which one is bound to take notice of, and which county court judges, in dealing with a case like this, ought to take notice of.

The appellants say that the onus was placed on the wrong side. I do not think that that is at all a fair conclusion from what was done. I am not prepared, for the moment, to assent to what Farwell L.J. said in *Calico Printers Association v. Higham* (1) on that point; but in a case like this, in which it is not very material on which side the onus was, I think that the evidence of the man himself, being strong, as it was, was not in any way counterbalanced or really affected by the evidence, the admissibility of which I doubt, of the man whose arm was lost many years ago, and who obtained such employment as he did before the Workmen's Compensation Act, 1897, came into operation.

In my opinion there was no misdirection. The learned judge has come to the conclusion which probably I should myself have arrived at, but it is quite unimportant whether I should have taken that same view. There was, in my opinion, before him evidence which quite justified him in saying "the present condition of the man is stable; there is no probability which I can find that he will get either better or worse." That being so, I think the appeal fails and must be dismissed with costs.

KENNEDY L.J. I agree, and for the reasons which have been given. I desire to add that I agree entirely with the view of the Master of the Rolls, and that it must not be taken, as far as I am at present advised, that I adhere to the opinion expressed by Farwell L.J. as to the burden of proof in applications of this sort.

SWINFEN EADY L.J. I am of the same opinion.

Appeal dismissed.

Solicitors: *Collyer-Bristow & Co., for S. Baguley, Ashton-under-Lyne; Barlow, Barlow & Ryde, for F. S. Rhodes & Bethell Jones, Manchester.*

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Employer and Workman—Original Application—Weekly Payment ended by Arbitrator—Second Application for Compensation—Power of Arbitrator to award again—Res judicata—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3.

A workman having sustained personal injury by an accident, his employers voluntarily paid him 10s. a week compensation for some months and then declined to continue the payments. The workman applied for arbitration under the Workmen's Compensation Act, 1906, and claimed a continuance of the payment. The county court judge found in favour of the employers and refused to make an award for 1d. a week so as to keep alive the workman's rights. There was no appeal from this award. Subsequently the workman applied again for compensation, but the judge refused to entertain the application, holding that the matter was *res judicata* and that he had no jurisdiction:—

Held, on appeal, that the learned judge had jurisdiction to make a final award or a suspensory award on an original application, and that the matter was therefore *res judicata*.

APPEAL from an award of the judge of the Birkenhead County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken substantially from the judgment of Swinfen Eady L.J.:—

Green, the workman, an apprentice riveter employed at Messrs. Cammell, Laird & Co.'s shipbuilding yard, on February 17, 1912, met with an accident which arose out of and in the course of his employment. A hot chip from a rivet injured his right eye, so that his sight by means of that eye was almost entirely lost. The employers voluntarily paid him compensation at the rate of 10s. per week from the date of the accident to November 11, 1912. The employers then contended that the workman was fit to return to work and ceased paying compensation.

On December 12, 1912, the workman applied to the county court for arbitration with respect to the compensation payable to him. He claimed a continuance of compensation at 10s. a week,

C. A. or some part of it. The employers, by their answer, contended
1913 (a) that the applicant had been for many weeks prior to
GREEN November 11, 1912, and then was fit to resume work; (b) that
v. the applicant was offered employment which he was able to
CAMMELL, perform, with consideration at the start, at his old rate of wages,
LAIRD & Co., but he declined to attempt the same; (c) that the applicant was
LIMITED. not then incapacitated for work by reason of the injury by
accident. The case was heard by the county court judge on
February 4, 1913. There was medical evidence on each side;
one of the doctors (an ophthalmic surgeon) called by the respon-
dents said that he first thought in the second week in July that
the applicant was able to go back to work. The county court
judge had the assistance of a medical referee and made an award
in favour of the respondents, without costs, the respondents not
asking for their costs, and declined to make an award of 1*d.* a week.
There was not any appeal from that award. In the absence
of any appeal, that finally ended the matter of the applicant's
claim for compensation.

The applicant returned to the company's service to do light
work, but after a few days he left their employment. On
March 10, 1913, he commenced proceedings anew by making
a fresh application for arbitration with respect to the com-
pensation payable to him, and claimed 10*s.* a week from
February 12, 1913. The respondents by their answer contended
that the questions raised in this new arbitration had already been
before the Court on February 4, 1913, on which date a final award
in favour of the respondents was made. The county court judge
on May 2, 1913, decided that the question which had arisen
between the applicant and the respondents was *res judicata*,
having been decided by the award of February 4, 1913, and he
dismissed the application. The county court judge further
stated that when the case came before him on the previous
occasion he came to the conclusion, guided by the opinion of the
medical referee, that the applicant had failed to make out a case
for any payment of compensation after the date when the
respondents had stopped the payments; that when the question
arose whether he should make an award for 1*d.* a week so as to
keep alive the applicant's rights, or make an award in favour of

the respondents, and still in accordance with the advice of the medical referee, he decided that he ought to make, and he did make, an award for the respondents. The workman appealed from the award of the county court judge on the second hearing determining that he could not further entertain the matter.

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Rigby Swift, K.C., and *J. H. Layton*, for the appellant. Such a question as this can never be *res judicata*, for, in the nature of things, the capacity to work must vary from time to time. The circumstances have altered since the award of February 4. The employers then promised suitable work, but have not provided it: *Radcliffe v. Pacific Steam Navigation Co.* (1) The question in *Nicholson v. Piper* (2) which is relied on by the employers was whether payments fixed by agreement could be reviewed. Here there was no recorded agreement, and no award of compensation; this was an original application for compensation, and on that the learned judge had no power to make an award determining the payments altogether, or to make a suspensory award. The appellant is not estopped by the first award. So long as his working qualifications are affected by the accident he is entitled to compensation for his inability to earn wages: *Ball v. William Hunt & Sons, Ltd.* (3)

Lias, for the employers. The learned judge had ample jurisdiction to terminate the payments and to refuse to keep alive the workman's rights. He was not asked to make a declaration on the subject. Whether the award was made on an original application or on an application to review is immaterial on the question of jurisdiction: *Hargreave v. Haughhead Coal Co., Ltd.* (4); *Griga v. Owners of the Ship Hareldc* (5); *Mountain v. Parr*. (6) The workman ought to have appealed from the first award, and as he did not do so he is bound by it.

Rigby Swift, K.C., in reply.

Cur. adv. vult.

July 21. The following written judgments were delivered:—

COZENS-HARDY M.R. [The Master of the Rolls stated the facts and continued.] In my opinion it is impossible for us to interfere.

(1) [1910] 1 K. B. 685.

(2) [1907] A. C. 215.

(3) [1912] A. C. 496.

(4) [1912] A. C. 319.

(5) (1910) 3 B. W. C. C. 116.

(6) [1899] 1 Q. B. 805.

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It was contended by Mr. Rigby Swift that there is no power to make, on an original application, what is known as a suspensory award for 1*d.* a week, and that Green could not have appealed from the first award. I am unable to agree with this contention. It seems to me that whether under an original application or under an application to review it is equally competent to the Court to make an award of 1*d.* a week. The case of *Griga v. Owners of the Ship Harelda* (1) is a clear authority in this Court on the point. I do not think it is open to us to depart from that decision. But having now had the point fully argued, I may say that I feel no doubt that 1*d.* a week may be awarded on an original application, and that if no such award is made it is competent to the workman to appeal against the award. No such appeal was presented in the present case and no such appeal can now be presented.

In these circumstances the decision of the House of Lords in *Nicholson v. Piper* (2) seems to me conclusive. The Court awarded in favour of the employers without any reservation of the right to the workman to apply in the future. In my opinion it makes no difference that there had not been any prior award, and that the payments of 10*s.* per week had been by voluntary agreement. In my opinion the judgment of his Honour Judge Stanger is quite right, and this appeal must be dismissed with costs.

KENNEDY L.J. The argument for the appellant in this case raises, if I have rightly appreciated it, the following contentions: It is contended that the learned county court judge had not on February 4 jurisdiction to order the termination of the weekly payments, if that be the true construction of his award of that date, and that, whatever be the effect of that award, he was wrong in point of law in holding as he did in his decision of May 2, 1913, which is the decision now under appeal, that the February award had finally concluded the question of compensation, and that it was not open to him at any subsequent date to entertain a claim by the present appellant in respect of the same accident as had formed the basis of the claim of the appellant which had been dismissed in February.

It is necessary to see exactly what the facts, which are few in

(1) 3 B. W. C. C. 116.

(2) [1907] A. C. 215.

number, are. On February 17, 1912, the present appellant, then an apprentice riveter in the employment of the respondents, received an injury of a permanent character to his right eye, which was entered and wounded by a hot chipping from a rivet. From thenceforward until November 11, 1912, he received 10s. a week as compensation from the respondents. They never disputed liability. There was no arbitration or formal agreement. On the last-mentioned date the respondents, believing that the appellant could then go back to work, and that the incapacity for work caused by the accident had come to an end, ceased to pay compensation. On December 12 the applicant applied for arbitration. The matter was heard by the learned county court judge at Birkenhead on February 4, 1913. He was assisted by a medical referee, and upon the evidence before him came to the conclusion that the applicant had failed to make out a case for any payment of compensation after the date when the respondents had stopped it. He then considered "whether he should make an award for 1*d.* a week so as to keep alive the applicant's rights or make an award in favour of the respondents"—I use his own language—meaning by the second alternative an award terminating the weekly payments. Now I am strongly of opinion that in cases of a permanent physical injury, such as this was, the arbitrator, if satisfied that the incapacity for work has for the time ceased, ought, as a general rule, not as a universal rule, inasmuch as in such a case an incapacity for work due to the injury may very possibly supervene at a later time, not to make an award simply terminating the weekly payments, but to make an order which keeps alive the employers' liability either by directing the weekly payment of a nominal sum or by a suspensory order. There is the highest authority for the propriety of either form. See *Taylor v. London and North Western Ry. Co.* (1) The view which I have expressed is also in accord with the views of the members of the Court of Appeal in *Griga v. Owners of the Ship Harelda* (2), and I think in other cases. Further, I doubt whether in the present case the learned county court judge, if his judgment of May 2 correctly records his attitude of mind in regard to the burden of proof on February 4, was right in

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(1) [1912] A. C. 242.

(2) 3 B. W. C. C. 116.

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treating, as the words "failed to make out a case for any payment" indicate that he treated, the burden of proof as resting upon the present appellant, seeing that the respondents had admitted the accident and the incapacity entitling him to compensation up to November 11 previous. But there has been no appeal against the award of February 4, and it is quite unnecessary to come to any conclusion on that point; and the only question which arises for our decision on the present appeal is this. In March, 1913, the appellant, who had in fact been employed for three successive days by the respondents upon light work after the date of the February award and left their employment of his own choice, applied for arbitration claiming compensation. It was not in form an application for a review under Sched. I., clause 16. The respondents in their answer relied upon (inter alia) the award of February 4 as a decision which had ended the weekly payments, and therefore the appellant's right to prosecute this further claim. At the hearing on May 2 of this year the learned county court judge upheld the respondents' contention and dismissed the appellant's application expressly upon the ground that his decision of February 4 had ended his jurisdiction to adjudicate between the parties as to compensation. It is from this judgment of May 2 last that the present appeal has been presented to this Court.

Now, there can be no doubt that, if on the arbitration proceedings on the preceding February 4 the learned county court judge had jurisdiction to terminate the weekly payments as he did, his judgment which is under appeal was right. The decision of the House of Lords in *Nicholson v. Piper* (1) clearly established the law upon this point. The appellant's counsel, however, contend that the county court judge had no jurisdiction to decide as he did on February 4 because, they argue, the arbitration proceedings on that occasion did not constitute a "review" under Sched. I., clause 16, inasmuch as there had been no prior arbitration proceedings fixing compensation. I cannot accept this reasoning. The Act of Parliament contemplates the settlement of a workman's claim to compensation by agreement with his employer quite as much as its settlement by arbitration; and, if

(1) [1907] A. C. 215.

circumstances in regard to the workman's incapacity for work change, it appears to me that if proceedings are instituted by one of the parties to end, diminish, or increase the weekly payment, those proceedings constitute a proceeding for a review within Sched. I., clause 16, none the less because the weekly payment to be ended, diminished, or increased, as the case may be, is a payment hitherto made under a voluntary agreement, formal or informal, and not under an award. It appears to me that this view is in accordance with the scheme and the true construction of this Act of Parliament, and it is not an unimportant fact, I think, that no such argument as is put forward by the learned counsel for the appellant was ever suggested—I think it would have been untenable—by the counsel who appeared for the applicants either in the House of Lords in *Taylor v. London and North Western Ry. Co.* (1), in the case of *Hargreave v. Haughhead Coal Co., Ltd.* (2), or in this Court in the case of *Griga v. Owners of the Ship Harelda* (3), to which I have had already occasion to refer. In all of these cases, as I understand the statements of facts in the reports, the circumstances are not different from those in the present case.

In my opinion the county court judge had jurisdiction at the hearing of February 4 to make an award which terminated the weekly payments; he did in effect so award, as he tells us he intended to do, and he has rightly held that, having so awarded, he had no jurisdiction on May 2 to make any further order on the appellant's application. This appeal, therefore, in my judgment fails and must be dismissed.

SWINFEN EADY L.J. stated the facts and continued. The appellant contends upon the authority of *Radcliffe v. Pacific Steam Navigation Co., Ltd.* (4) that the county court judge was wrong in holding that the matter was *res judicata*; that the amount of wages which the workman is able to earn at the date of the review is a matter which had not been, and could not have been, litigated between the parties prior to the date of the review, and therefore could not come under the head of *res judicata*.

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(1) [1912] A. C. 242.

(2) [1912] A. C. 319.

(3) 3 B. W. C. C. 116.

(4) [1910] 1 K. B. 685.

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This argument loses sight of the fact that in cases like *Radcliffe v. Pacific Steam Navigation Co., Ltd.* (1) there is an award for the payment of compensation in existence and compensation payable under it. The weekly payments may be reviewed from time to time, and increased or diminished as circumstances may require, and the question of a workman's capacity at the date of a review is not decided by a finding as to his condition at a previous date. In the present case, however, there was not any award for compensation; on the first application the workman had failed, and the award was in favour of the respondents, and that (unless appealed from) completely and finally terminated the matter. In *Nicholson v. Piper* (2), upon an application for review and termination of payments, the arbitrator made an award that the weekly payments should be ended, on the ground that the incapacity had ceased. The workman did not appeal, but afterwards applied for another arbitration with respect to the review and increase of the weekly payment on the ground that he was unable to work through the accident; and it was held by the unanimous judgment of the House of Lords affirming the Court of Appeal, that the first award ending the weekly payments was final and could not be reopened. Lord Halsbury pointed out that as the form of order precluded the possibility of any future application it would have been competent to the workman to appeal against it, on the ground that there was a right to have compensation at whatever period the incapacity might recur, but as it was not appealed from, it put an end to the power of the workman to apply again.

In the subsequent case of *Taylor v. London and North Western Ry. Co.* (3) the House of Lords, affirming the Court of Appeal, decided that a county court judge, where he is satisfied that the incapacity resulting from the injury has finally disappeared, may finally end the weekly payments. Lord Loreburn said at p. 245: "We are bound by the decision in *Nicholson v. Piper*. (2) It is thus settled that when a county court judge is satisfied that the incapacity resulting from an injury has finally disappeared he can so adjudge and thereby finally end the weekly payment

(1) [1910] 1 K. B. 685.

(2) [1907] A. C. 215.

(3) [1912] A. C. 242.

beyond revival. This may be attended with hardship if in any case the incapacity should in fact return contrary to the anticipation of the county court judge. Under paragraph 1 (b) of the First Schedule, the weekly payment is to be 'during the incapacity,' and it might possibly happen that a man entitled under the Act would find himself barred by an order to end the weekly payment made under an erroneous expectation. I do not think there is anything in the decision of *Nicholson v. Piper* (1) which prevents the county court judge from adjudging that the weekly payment be ended until further order. The same result is, we are told, attained by a practice of ordering a merely nominal payment in order to keep the question alive. In my view, either of these methods may be lawfully adopted. An ending of payment may be either temporary or permanent."

The appellant then contended that although on an application to review, the county court judge might make a suspensory award of 1*d.* a week, and keep the claim alive, in the event of incapacity supervening in future, yet the judge had no such power, in the case of an original application by the workman, where the claim failed by reason of the workman having so far recovered from his injury as to be able to work and command his old rate of wages. In principle, however, there cannot be any difference between making a suspensory award at the original hearing, when the claim for substantial compensation fails on the ground that the workman is then able to resume his work at his ordinary wages, and making it on an application to review when the weekly payments are ended on the same ground. If the workman receives a permanent injury, and the incapacity may recur owing to the effects of the original accident, there is jurisdiction to make a suspensory award as well on an original hearing as on an application to review. This point was determined by this Court in *Griga v. Owners of the Ship Harelda*. (2) There a seaman had been ruptured by an accident, and applied for arbitration. The county court judge came to the conclusion that the man was fit for his full work as an A.B. and made an award in favour of the respondents, thus finally determining any question of

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(1) [1907] A. C. 215.

(2) 3 B. W. C. C. 116.

C. A. liability. The workman appealed and this Court allowed the
1913 appeal and determined that the workman was entitled to a

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suspensory award of 1d. a week. Owing to the words "terminating all liability" occurring in the head-note of the report, it was suggested that it might have been an application to review, but the papers have been examined and it is clear that it was an original application by a workman for compensation. See also *Owners of the Vessel Tynron v. Morgan*. (1) Reference was made to the two recent cases of *Hargreave v. Haughhead Coal Co., Ltd.* (2) and *Ball v. William Hunt & Sons, Ltd.* (3), but these cases do not assist the appellant. In the former case it was held that the arbitrator was right in ending compensation when the incapacity arising from loss of an eye had ceased, and the workman was able to resume his former work at full wages, notwithstanding incipient cataract in the other eye, in no way attributable to the accident. In the latter case it was held that a workman who sustained such an accident to an eye (blinded by a former accident) as necessitated its removal, and the consequent disfigurement of the man, converting him into a manifestly one-eyed man, and injuring his wage-earning capacity by preventing him from obtaining employment at his trade, was entitled to compensation for the injury resulting from the second accident notwithstanding that the first accident had already rendered him blind of that eye, and consequently the second accident did not prejudicially affect his sight. The appellant then suggested that he ought now to have his time extended for appealing from the first award of the county court judge with a view of obtaining a suspensory award, but such leave ought not to be given. It was applied for in *Nicholson v. Piper* after the hearing in the House of Lords, but refused: see *Nicholson v. Piper* (No. 2). (4)

The result is that this appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Helder, Roberts, Walton & Co., for John A. Behn, Liverpool; Rawle, Johnstone & Co., for Laces, Wilson, Todd, Stone & Co., Liverpool.*

(1) [1909] 2 K. B. 66.

(2) [1912] A. C. 319.

(3) [1912] A. C. 496.

(4) (1907) 24 Times L. R. 16.

[IN THE COURT OF APPEAL.]

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HOWARTH v. A. KNOWLES & SONS, LIMITED.

1913

July 9, 10.

Employer and Workman—Compensation—Contracting out—Scheme of Compensation under Workmen's Compensation Act, 1897—Accident during Currency of Scheme—Termination of Scheme by Non-certification under Workmen's Compensation Act, 1906—Limit of Employer's Liability—Revival of Workman's Rights under the Act—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 3—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 15.

Where a workman had accepted a scheme of compensation duly certified under s. 3 of the Workmen's Compensation Act, 1897, and had met with an accident in the course of his employment, in respect of which he received weekly payments from 1901 to 1912, when the funds of the society were exhausted, the scheme having been terminated in consequence of not being recertified under the Workmen's Compensation Act, 1906 :—

Held, that the workman, having accepted the scheme, was outside the provisions of the Act altogether, and could not successfully claim compensation thereunder.

Horn v. Lords Commissioners of the Admiralty [1911] 1 K. B. 24, followed.

Observations of Fletcher Moulton L.J. in *Godwin v. Lords Commissioners of the Admiralty* [1912] 2 K. B. 26, distinguished.

APPEAL from a decision of the judge of the Manchester County Court sitting at Salford as arbitrator under the Workmen's Compensation Act, 1897. The county court judge dismissed the applicant's application for compensation on the ground that he had no jurisdiction to entertain it, the applicant having contracted out of the Act by accepting a scheme duly certified by the Registrar of Friendly Societies under s. 3 of the above-mentioned Act.

The applicant was a workman in the employment of the respondents, A. Knowles & Sons, Limited. On June 27, 1901, he signed the register of members of a society established by a scheme duly certified on December 30, 1898, by the Registrar of Friendly Societies under s. 3 of the Act of 1897. The society was called "The Andrew Knowles & Sons, Limited, Accident Society."

Rule III. of the society was as follows : "The society is established by mutual agreement between Andrew Knowles & Sons,

C. A. Limited, hereinafter termed the company, and such of their
 1913 workmen as shall voluntarily become members, as a substitute
 HOWARTH for the Employers' Liability Act, 1880, and the Workmen's
 v. Compensation Act, 1897, and to provide a fund to be used to
 A. KNOWLES & SONS, compensate any member for any personal injury by accident,
 LIMITED. arising out of or in the course of his employment."

Rule IV. provided: "Membership shall be confined to persons employed in or about the mines or works belonging to Andrew Knowles & Sons, Limited, and any person so employed shall be entitled to become a member on signifying his desire so to do and signing the register of members. The signing of such register and the payment of the contributions hereinafter mentioned shall constitute acceptance of the conditions and shall entitle him to the benefits of the society, and shall be deemed a contract within the provisions of s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897, and the member shall relinquish all legal claims against the company in respect of any accident which may occur to him in the course of his employment by the company. No person shall be required to become a member of this society as a condition of employment by the company."

Rule XXIX. provided: "Six months' notice from the company or from a two-thirds majority of the members shall terminate the existence of this fund, and any balance remaining after providing for all liabilities shall be distributed as may be arranged between the company and the members, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion."

The certificate of the Registrar of Friendly Societies was in the following form:—"It is hereby certified that the foregoing scheme is on the whole not less favourable to the general body of workmen and their dependants than the provisions of the Workmen's Compensation Act, 1897. This certificate is to expire on the 31st December, 1903."

This scheme having expired by effluxion of time on December 30, 1903, a new scheme, substantially the same as the first, was certified for a further period of five years. The funds under the two schemes were not in any way distinguished. The new scheme came to an end in consequence of not having been

recertified under s. 15 of the Workmen's Compensation Act, 1906. (1)

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The applicant, who in November, 1901, had met with an accident in the course of his employment, received compensation under the scheme at the rate of 12s. per week from November, 1901, to November, 1912, when the total funds available under the scheme were exhausted. He then claimed compensation under the Act of 1897.

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It was contended on his behalf before the county court judge that as there was now no subsisting scheme the workman's rights under the Act of 1897 had revived, and that there was jurisdiction to entertain the application although the accident happened during the currency of a scheme which was valid under s. 3, and the applicant had duly contracted to take the benefits of the scheme in substitution for those of the Act and had actually enjoyed them from 1901 to the end of 1912.

The county court judge declined to take that view, but held that, the contract having been duly made and the benefits actually enjoyed, the employers had ceased to be liable under the Act, and that he had no jurisdiction to entertain the application.

The workman appealed.

A. Ralph Thomas, for the appellant. The combined effect of the Act and the scheme in this case was to give the workman a right to compensation under the scheme in lieu of his right under the Act. But that was limited to the duration of the scheme, and as soon as the scheme came to an end the workman's rights under the Act were revived. There is now no scheme in existence, and the fact that the appellant has received benefits under it is immaterial and does not deprive him of his rights under the Act. In *Godwin v. Lords Commissioners of the Admiralty* (2) *Fletcher Moulton L.J.* said in reference to s. 15 of the Act of 1906: "This contractually terminates all the contracts

(1) Sect. 15, sub-s. 4, of the Workmen's Compensation Act, 1906, provides: "If any such scheme" (a scheme under the Workmen's Compensation Act, 1897) "has not been so re-certified" (by the Registrar of Friendly Societies) "before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked."

(2) [1912] 2 K. B. 26, 34.

C. A. under the scheme, because by s. 3 of the previous Act under
 1913 which they were made they only last until the certificate is
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J. Sankey, K.C., and Adshead Elliott, for the respondents.
 The provisions of s. 3 of the Act of 1897 are quite clear. Where
 a workman accepts a certified scheme he is remitted to his rights
 under it, and cannot afterwards revert to his rights under the
 Act; he is outside the provisions of the Act altogether: *Horn v. Lords Commissioners of the Admiralty*. (1) Sect. 3, sub-s. 5, of
 the Act of 1906 provides that when a certificate is revoked or
 expires any moneys or securities held for the purpose of the
 scheme shall, after due provision has been made to discharge the
 liabilities already accrued, be distributed. Those words do not
 appear in the Act of 1897, and they shew that it is the scheme
 alone which is liable for accrued liabilities. In *Godwin v. Lords Commissioners of the Admiralty* (2) Fletcher Moulton L.J. must
 not be taken to have been referring to rights which had already
 arisen during the existence of the scheme. See also *Taylor v. Hamstead Colliery Co.* (3) Moreover in any event the appellant's
 claim is out of time, not having been made within six months
 of the date of the accident as required by the Act of 1897.

A. Ralph Thomas in reply.

COZENS-HARDY M.R. This appeal raises a question of considerable importance to an enormous body of workmen who become accessory to schemes under the Act.

The learned county court judge in the present case has held, in circumstances which I will mention, that the appellant has no claim under the Workmen's Compensation Act of 1897—the old Act—against his employers. In my view he was quite right. What are the material provisions of the Act? The general policy of the Act of 1897, as well as the present Act of 1906, is this, that an employer is liable to compensate a workman for an injury arising out of and in the course of the employment, and the employer is not allowed to contract himself

(1) [1911] 1 K. B. 24.

(2) [1912] 2 K. B. 26, 34.

(3) [1904] 1 K. B. 838.

out of that statutory obligation and liability. But there is a provision in the Act of 1897 that if a scheme is certified by the proper authority, although a workman cannot be obliged to come into the scheme, he has the option of doing so if he is so minded, and if he does come into the scheme then he is altogether outside the Act. As I said in *Horn v. Lords Commissioners of the Admiralty* (1), it is perfectly clear that a workman who has come under that scheme and signed that agreement is outside the provisions of the Act altogether.

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Now what has happened here is this : There was a scheme (to the terms of which I shall call attention in a moment), and the workman signed adherence to that scheme. The scheme was one which endured for five years only. An accident arose during the currency of the scheme, and after its signature by the workman. It involved serious liability in respect of which weekly payments have been made for a long time. The argument on behalf of the appellant is this: that the only effect of the Act and the scheme together is that the suspension of liability of the employer is prolonged for five years, during which time the employer can escape all liability apart from the scheme, but that when that period is over the scheme is at an end, and thereupon the parties are remitted to their rights under the Act. Now that involves consideration of the Act itself. The 3rd section of the Act of 1897 provides that the Registrar of Friendly Societies, after ascertaining the views of the employer and workmen, may certify a scheme which is not less favourable to the general body of the workmen than the provisions of the Act. Then the employer may contract with the workmen that the provisions of the scheme shall be substituted for the provisions of the Act, and thereupon the employer shall be liable only in accordance with the scheme, notwithstanding any contract to the contrary made after the commencement of the Act. Then the Registrar cannot give the certificate for a less period than five years. Further, no scheme shall be certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring. Then sub-s. 4 provides that the Registrar may revoke the certificate on certain conditions, which have not arisen here, and sub-s. 5 provides

(1) [1911] 1 K. B. 24.

C. A. 1913 <hr/> HOWARTH v. A. KNOWLES & SONS, LIMITED. <hr/> Cozens-Hardy M.R.	that when a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and the workmen, or as may be determined by the Registrar of Friendly Societies. That seems to me to amount to this, that under a certified scheme of this nature the employer, in respect of the liability accruing during its continuance, is not liable at all except in accordance with that scheme.
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Now I come to the scheme. Its general object is to provide a fund in substitution for the liability of the employers—the scheme is to be substituted for the provisions of the Act. The object of the scheme is “to provide a fund to be used to compensate any member for any personal injury by accident arising out of or in the course of his employment.” Membership is to be confined to men working at certain work, and by the latter part of rule IV. the scheme is to be deemed a contract within the provisions of s. 3, sub-s. 1, of the Workmen’s Compensation Act, 1897, and the member “shall relinquish all legal claims against the company in respect of any accident which may occur to him in the course of his employment by the company.” Then the treasurer of the fund shall be Andrew Knowles & Sons, Limited. There is a provision that the committee may compensate by a lump sum, and rule XXIX. contains the following provision which is not unimportant: “Six months’ notice from the company or from a two-thirds majority of the members shall terminate the existence of this fund, and any balance remaining after providing for all liabilities shall be distributed as may be arranged between the company and the members, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.” “Liabilities” is a term which plainly includes liabilities which have ripened at the date of the termination—liabilities which may be future, contingent, or uncertain, but all of which have to be worked out and provided for. The point which has really been taken in argument before us is this. It was admitted there was an accident which arose during the continuance of the scheme, and that the fund was in existence and was a fund in substitution for the statutory liability;

but then the moment the five years had expired, what had to be done? Sect. 3 says: "Any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and the workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion." In my opinion that is obviously not right without qualification. There must be in any scheme of this kind some liabilities actually accrued so as to become actual debts, or liabilities which are continuing liabilities, and I think it would be altogether wrong to suppose that this fund could be treated as a closed fund at the moment of the expiration of the scheme, without regard to the liabilities which had been incurred at that date. It seems to me that, once it is established that the employee has under the scheme accepted the liability of the fund in substitution for that of the employer, the fund is liable for all claims in respect of accidents which had arisen during the continuance of this scheme, that is to say, during the five years.

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With regard to the suggestion as to some observations of Fletcher Moulton L.J. in *Godwin v. Lords Commissioners of the Admiralty* (1), I do not think it is doing him justice to suggest that he really had this case in his mind at all, for it is plain to me he was not in the least considering the question which arises in the present case.

I cannot bring myself to doubt in the present case that the employee has, unfortunately for himself, accepted the liability of the fund in substitution for that of his employers—a fund which could not be properly divided between the members until after satisfaction of or provision for compensation in respect of claims which had arisen during the continuance of the scheme. With regard to any question of maladministration, that is a matter which does not throw any liability on the employer, though in such a case there might be a claim against those who mal-administered the fund, but it is not for me to say, because I have no evidence before me.

I am quite clear in my own mind that there is in respect of an accident happening during the continuance of this agreement no

(1) [1912] 2 K. B. 26.

C. A. right whatever to compensation under the Act. The appeal,
1913 therefore, must be dismissed.

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KENNEDY L.J. I am entirely of the same opinion. I think that the learned county court judge's judgment correctly sums up the true position of these parties when he states that the applicant had duly contracted to take the benefits of the scheme in substitution for those of the Act and had actually enjoyed them from 1901 to the end of 1912. It seems to me you cannot, where there is a certified scheme of compensation, which is to be taken in substitution for the provisions of the Act of Parliament, say that, in regard to a claim which accrues during the continuance of the contract, the workman can also get the benefit of the Act in substitution for which he has contractually bound himself to take something else. When you look at the rules of this scheme it is quite clear that the object of the scheme was to provide a fund to be used to compensate any member for any personal injury by accident arising out of or in the course of his employment, as a source of benefit, if I may use the phrase, to which every member who adhered to the scheme (a voluntary act on his part) agreed to look instead of taking the benefits which the Legislature had provided. When you turn, for example, to rule IV., "and the member shall relinquish all legal claims against the company in respect of any accident which may occur to him in the course of his employment," I see no right to read into that rule, as the argument for the appellant requires, "provided always that when this five years' scheme comes to an end, he retains all the rights which he had agreed to surrender in consideration of the benefits of the scheme," or, as I venture to put it,—I do not say with exact, but practical accuracy—to substitute for that rule, "I postpone so long as this five years' period exists all my legal claims, if any, against the company for an accident happening during the time of the existence of the scheme." It may be that the scheme was not so perfect as it was intended to be. It is possible, of course, while the scheme itself is good, that it may be maladministered, but those are not contingencies which can possibly affect the legal contract which has been entered into with legislative

sanction. To say "Because the scheme is one which the authority appointed by Parliament ought not to have accepted, or because it has been maladministered, therefore I can get more rights than I would have done otherwise," to my mind will not do. It might be that there was an ample fund at the end of the five years, from the actuarial point of view, to complete the payments in the future which had begun in respect of an accident coming within the Compensation Acts. But, be that as it may, if a person has accepted something in lieu of something else, he cannot afterwards turn round (when from the beginning that something he was to accept was a fund under a scheme which would last to his knowledge for five years) and say "No, I have only taken that as long as it lasted; I am now going to take that which I agreed to give up in consideration of my getting the advantage of the five years' scheme." Counsel for the appellant invites us to say that it was a contract only to take benefits so long as the five years' scheme lasted. With great respect I say it was not; it was to take the benefits of a fund created by the scheme for five years, but it was to the fund, great or small, that the workman agreed to look for the exercise of his rights as an injured workman instead of his claims under the Act.

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Kennedy L.J.

With regard to what was quoted from Fletcher Moulton L.J.'s judgment, while, of course, one is bound to have the deepest respect for any opinion expressed in that judgment, I accept the explanation which counsel for the respondents has offered as to the Lord Justice's real meaning. I do not myself think that he had in view the circumstances of the present case, namely, the result to the workman of there being a revocation of the original certificate without recertification as affecting rights which had arisen during the time of the contract so far as those rights were rights which could be enforced against the fund of the scheme while it lasted. I think this appeal fails.

SWINFEN EADY L.J. I am of the same opinion. The appellant is asking us not to construe but to ignore the terms of s. 3 of the Act of 1897. The language of that section appears to me to be clear. The employer may contract "that the provisions of the

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scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme." The liability under the Act is not to be in addition to the liability under the scheme; the two are not co-existent; the one is substituted for the other. What the appellant asks us to do is to read this provision as if it ran: "The employer shall be liable in accordance with the scheme so far as regards sums which have actually accrued payable to injured workmen while the scheme was in force, and shall also be liable under the Act for sums subsequently accruing payable in respect of accidents happening while the scheme is in force." That is quite contrary to the language of the section: that the employer shall be liable only in accordance with the scheme, and that the one liability shall be substituted for the other.

I can add nothing to what has been said with regard to the language of Fletcher Moulton L.J. in *Godwin's Case* (1), except by reading what the learned Lord Justice said in *Horn v. Lords Commissioners of the Admiralty* (2), which shews that he was taking the same view of this provision as this Court is now taking. In *Horn v. Lords Commissioners of the Admiralty* (2) he said: "It is common ground that the workman, having power to accept the benefits of the scheme in lieu of the benefits of the Act, did so. Now what is the consequence of his doing so? That is stated in s. 3 of the Act with a clearness that leaves nothing to be desired. It says that the workman may contract 'that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme.' The consequence is that we have to look to the scheme solely to find the liability of the employer. In other words, the workman's right to compensation is purely contractual and is the same as if this Act did not exist." The appellant is asking us to say that the workman's right to compensation is not only under the scheme but also under the Act. With regard to sub-s. 5 of s. 3 of the Act of 1897, it provides for the distribution of the moneys or securities when the scheme is revoked or has expired. Under the present Act the language is too clear to admit of doubt. By sub-s. 5 of

(1) [1912] 2 K. B. 26.

(2) [1911] 1 K. B. 24.

s. 3 it is provided that "When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued,"—that would manifestly include all present and future liabilities in respect of past accidents, that is to say, risks that had become payable—"be distributed" as therein provided.

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It has been said that the provision of the earlier statute cannot be construed by the provisions of the latter. In my opinion the provision of the earlier statute is in itself not open to any real doubt: "When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and the workmen," and then if there is a difference of opinion the Registrar is to determine. The Registrar would have to take into account the claims of workmen and employer, and as regards workmen, the injured as well as the uninjured, and the surplus would have to be distributed according to their rights and interests.

I am of opinion that this appeal fails.

Appeal dismissed.

Solicitors: *Nicol, Son & Nicol, for C. H. Pickstone, Radcliffe; James Mellor & Coleman, for Batty, Ford & Buckley, Manchester.*

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[IN THE COURT OF APPEAL.]

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July 10, 11.

BIRKS v. STAFFORD COAL AND IRON COMPANY.

Employer and Workman—Industrial Disease—Certificate of Disablement—Certifying Surgeon—Refusal to give Certificate—Appeal to Medical Referee—Jurisdiction—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 8.

By s. 8, sub-s. 1 (iii.) (*f*), of the Workmen's Compensation Act, 1906, if an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement of a workman by an industrial disease within the Act, the matter shall be referred to a medical referee, whose decision shall be final. Where the certifying surgeon had given a certificate that a workman was suffering from an industrial disease, but in the certificate fixed the commencement of the disablement at a date which, under the circumstances of the case, precluded the workman from taking proceedings for compensation under the Act:—

Held, that the workman was "aggrieved" by the refusal of the surgeon to give a certificate within sub-s. (*f*), and that the workman had a right of appeal to the medical referee.

APPEAL from an award of the judge of the Staffordshire County Court held at Stoke-on-Trent, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, William Birks, had been employed as a miner by the respondents since 1899 until September 1, 1911, when he was suffering from colitis and had to give up work. He was a patient at the hospital until November, 1912. At the beginning of November, 1912, having suffered for about four years from his eyes, he went to see an ophthalmic surgeon, who told him that he had miner's nystagmus (an industrial disease within the Third Schedule to the Act) and advised him to go to the certifying surgeon. The certifying surgeon gave him a certificate that he was suffering from nystagmus, but did not specify on the certificate any date as the commencement of the disablement. On the application of the workman and his solicitor, the certifying surgeon on January 18, 1913, gave another certificate in which he fixed the date of disablement as November 27, 1912. This certificate was useless to the applicant having regard to the fact

that by s. 8, sub-s. 1, of the Act (1), in order to entitle him to compensation he must shew that the disease was due to the nature of any employment in which he was employed at any time within the twelve months previous to the date of the disablement, and in this case he had not been employed in the mine since September 1, 1911. The applicant then appealed to the medical referee, who on January 21, 1913, allowed the appeal, and fixed the date of disablement as September 1, 1911. A claim for compensation was then made and, the employers having denied liability, arbitration proceedings were commenced. At the hearing before the county court judge objection was taken to the jurisdiction on the ground that no appeal lay to the medical referee except in the case of a refusal by the certifying surgeon to give a certificate.

The county court judge overruled the objection and made his award in favour of the workman.

The employers appealed on the ground (*inter alia*) that the county court judge was wrong in law in holding that an appeal under s. 8, sub-s. 1 (iii.) (*f*), of the Workmen's Compensation Act, 1906, lies to the medical referee where the certifying surgeon has given a certificate fixing the date of the

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(1) Sect. 8 of the Workmen's Compensation Act, 1906, provides: "(1.) Where the certifying surgeon certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement he shall be entitled to compensation under this Act as if the disease were a personal injury by accident arising out of and in the course of that employment (*f*) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in

giving or refusing to give a certificate of disablement the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final (4.) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that—(*a*) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine"

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J. Sankey, K.C., and Milward, for the appellants. Under the circumstances of this case there was no right of appeal from the certifying surgeon to the medical referee. In the first place the certifying surgeon had no jurisdiction to amend his certificate or to give a second one. Having given a certificate he was *functus officio*; but it is not desired to press that objection. Having given a second certificate fixing the date of commencement of the disablement as on November 27, 1912, the workman had no right of appeal to the medical referee. Under s. 8, sub-s. 1 (iii.) (*f*), it is only in the case of the refusal of the certifying surgeon to give a certificate that the matter can be referred to the medical referee; and here there was no such refusal, because a certificate was given. According to the terms of the subsection the employer has a right of appeal where the certificate has been given, and the workman has a right of appeal where the certificate has been refused. This is made clear by the Forms 9, 10, and 15 given in the schedule to the Regulations made by the Secretary of State as to the duties and fees of certifying and other surgeons and as to references to medical referees under s. 8 of the Act. By s. 8, sub-s. 4, the date of disablement is to be fixed by the certifying surgeon, and if he is unable to certify the date, it is to be the date on which the certificate is given. It is submitted that there can be no appeal to the medical referee by the workman unless there has been a refusal by the certifying surgeon to give a certificate; there has been no such refusal here. The learned county court judge seems to have relied on *Moore v. Naval Colliery, Ltd.* (1), but that case has nothing to do with the point in the present case.

Adshcad Elliott, for the respondent. A workman has the right of appeal to the medical referee whether the certificate is given or refused. He may be "aggrieved" under sub-s. (*f*) if a certificate is given which is of no use to him; and that is the case here. The certificate which was given did not leave it open to the workman to prove that the disease from which he suffered

was due to the nature of the employment in which he was employed at any time within twelve months of the disablement. The giving of such a certificate amounted to a refusal by the certifying surgeon. The certificate required in such a case is one which, if granted, will enable the workman to take proceedings for compensation. If the certifying surgeon gives a certificate which in effect puts the workman outside the Act, he in fact refuses to certify. If the contrary contention be right, then the certifying surgeon can so frame his certificate as to deprive the workman of his right to appeal. The forms prescribed for use under the Act are subject to variation so as to be adapted to different cases. [He also referred to *M'Ginn v. Udston Coal Co.* (1)]

Sankey, K.C., in reply. The respondent is in a dilemma. Either the certifying surgeon has given a certificate or he has refused to do so. If he has given it, then he alone is in a position to fix the date of disablement, and there is no appeal. It cannot be said that he has refused, because the certificate which he has given is before the Court.

COZENS-HARDY M.R. This appeal raises a curious point, and, no doubt, one of considerable importance. It is a question of an industrial disease—miner's nystagmus. The miner worked in the mine of the employers up to September, 1911. He had been suffering from nystagmus before, but not to an extent which disabled him. He ceased to work in the colliery on September 1, 1911, and shortly afterwards went into a hospital, where he remained for some time, suffering from colitis. On leaving the hospital he consulted a doctor about his eyes, and the doctor told him he was suffering from nystagmus. He then went to the certifying surgeon and obtained from him a certificate in this form: "I hereby certify that having personally examined William Birks on the 27th November 1912 I am satisfied that he is suffering from miner's nystagmus"—being one of the diseases to which the Workmen's Compensation Act applies—"and is thereby disabled from earning full wages at the work at which he was employed." In that certificate no date was fixed as the

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C. A. commencement of the disablement. The workman and his solicitor
 1913 were not satisfied with that, and they went again to the certifying
 BIRKS surgeon and asked him to fix the date. He then, not unnaturally,
 STAFFORD inserted the date upon which he had examined the man, which was
 COAL AND on November 27, 1912, and he gave what may be regarded either as
 IRON an amended certificate or a supplementary certificate saying :
 COMPANY. " I certify that the disablement commenced on the 27th November
 Cozens-Hardy 1912." I should be very sorry to suppose that the certifying
 M.R. surgeon, under those circumstances, had not a right to amend what
 was a slip in his original certificate, and I feel no doubt whatever
 that the objection which Mr. Sankey hinted at, but really did not
 press, was not one which he could sustain. The amended certificate
 therefore stated that the disablement commenced on November
 27, 1912,—that was more than twelve months after the man
 had left the colliery—and was a certificate which was quite useless
 to him ; he might as well have had no certificate at all, and, in
 fact, it was of no more value to him than waste paper. He then
 applied by way of appeal to the medical referee, who gave a
 certificate allowing the appeal and fixing September 1, 1911,—that
 is the date when he left work in the colliery—as the date on
 which the disablement commenced. On that certificate the
 workman applied for compensation, and his Honour Judge
 Ruegg, following the law laid down in *Moore v. Naval
 Colliery Co.* (1), held that although more than twelve months
 had elapsed after the date when the accident, according to the
 interpretation of s. 8, had taken place, yet there was a reasonable
 ground for the delay, and the applicant was not prejudiced by
 it. Then the objection was taken—and this is the only point
 raised upon the appeal—that there could be no appeal from the
 decision of the certifying surgeon, who had in fact given a
 certificate although that certificate was useless. Notwithstanding
 the able argument to the contrary, I have come to the
 conclusion that his Honour Judge Ruegg was perfectly right.
 The section undoubtedly contemplates and provides that the
 certifying surgeon is the person who is to give the certificate,
 and the effect of that certificate is quite plain. The date of dis-
 ability is to be such date as the certifying surgeon certifies as

(1) [1912] 1 K. B. 28.

the date on which such disablement commenced, or, if he is unable to certify the date, it is to be the date on which the certificate was given, and then there is a proviso that where the medical referee allows an appeal against the refusal by the certifying surgeon the date of disablement shall be such as the medical referee may determine. Then where an employer or workman is "aggrieved" by the action of the certifying or other surgeon in giving or refusing a certificate of disablement the matter is to be referred to the medical referee. That is sub-s. (f). Now, was the workman, or was he not, "aggrieved by the action of the certifying surgeon in giving or refusing to give a certificate"? It seems to me that the workman thought he was "aggrieved." It may be put in various ways. He was aggrieved by the giving of the certificate which was given and was quite useless, or by the surgeon refusing to give a certificate within the meaning of the Act which would have been of use to him. I see no difficulty whatever in holding that the man was "aggrieved," whether he is treated as "aggrieved" by the certificate which the surgeon gave, or by his refusing to give the certificate which the workman required and which alone was necessary to enable him to proceed under the Act. On that short ground, it seems to me that the appeal must fail. But then Mr. Sankey treats this not as a refusal but as the giving of a certificate, and he says in that case there is no power in the medical referee to fix the date. It does not arise for decision. If the workman be treated as "aggrieved" by the surgeon's refusing to give him a proper certificate within the meaning of the Act, I may perhaps assent, though it may only be a dictum, to the observation of the Lord President in *M'Ginn v. Udston Coal Co.* (1), who said that the medical referee may do anything that the certifying surgeon could have done.

In my opinion, the decision of his Honour Judge Ruegg was right, and this appeal must be dismissed with costs.

KENNEDY L.J. This is a difficult case, but I have come to the same conclusion as that which the Master of the Rolls has just stated to be his view in favour of Mr. Elliott's client. The

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question is whether or not the application by way of appeal to the medical referee was one which he could entertain having regard to the provisions of sub-s. 8 of the Act. By that sub-section if an employer or workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, then the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final, and, in connection with that section, the learned counsel who has argued against the decision under appeal properly refers to sub-s. 4 of s. 8, that "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given," with a proviso that where the medical referee allows an appeal against the refusal by the certifying surgeon to give a certificate of disablement the date of disablement shall be such date as the medical referee may determine. Now, in this case, it is the date of disablement which is the important point—the decisive point—in regard to the validity of the workman's claim, and the appeal which was entertained by the medical referee was an appeal "In the matter of a refusal of a certifying surgeon to give a certificate of disablement to William Birks as from the first of September, 1911, in pursuance of the Act." Therefore, in terms, the appeal as presented to the medical referee was an appeal against a refusal by the certifying surgeon to give a certificate of disablement; but it is said by Mr. Sankey that there is a dilemma on one or other horn of which the applicant is impaled. He says is it a case in which there has been under sub-s. (f) either a giving or refusing to give a certificate of disablement? If it is a giving, then there was no power under the section which I have just read to alter the date of disablement on appeal to the referee; and if it is said that there has been a refusal, where is that refusal to be found? In fact, the certificate was given, and, therefore, sub-s. (a) of sub-s. 4 of s. 8 does not give, properly read, the right to appeal which is claimed in the present case. I think it does not matter whether the giving is the giving of a certificate or the giving of a certificate in terms to which objection can be taken, because then

it is a certificate which embodies something which does cause the workman to come, by reason of its effect, into the status of an aggrieved person. In the same way, I think, that refusing is to be read in a general manner-- it is to be read as refusing to give a certificate of disablement, that is a certificate which will not by reason of any of its contents prevent it being a certificate of disablement upon which the workman can succeed. I think it covers or includes all those cases. I think in the present case the advisers of the workman were right in the form which they adopted, because the printed forms attached to the Act are to be treated merely as general guides, and permit of such modifications as may be necessary to meet the particular case. In my opinion, there was here a request by the workman to give a certificate such as he asked for, and there was a refusal, as it appears to me, by the certifying surgeon to comply with that request which was for a certificate of disablement specifying the date which the workman justly sought to have included. When I say "justly," I mean justly as appears by the result. Therefore there was an aggrieving of the workman—a grievance suffered by the workman—in getting a certificate which was not that which he had asked for, and there was an aggrieving of the workman in the refusal of the surgeon to give the certificate for which the workman did ask. I think there is no difficulty, therefore, really, in giving a fair construction to this rather complicated piece of legislation by saying that in the present case there was within the fair meaning of the construction of this section in fact a refusal to give a certificate such as the workman asked for, and it was a refusal which was, therefore, the subject of appeal, and upon appeal the medical referee was entitled to do what he did, which was to deal with the date of the disablement.

I think, on the whole, therefore, though I quite appreciate the points on the other side, that the truer view is that which is put before us in the judgment of the learned county court judge. I think this appeal, therefore, should be dismissed.

SWINFEN EADY L.J. I am of the same opinion. A workman is entitled to compensation under the statute where it is certified that he is suffering from a scheduled disease and the disease is

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due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of disablement, and the date of disablement is fixed by certificate; so that, to entitle the workman to succeed, there must be first a certificate—whether it is from the certifying surgeon or the medical referee—under s. 8, sub-s. 1, and the date of disablement is fixed by the certificate. For the workman to recover, the disease must be due to the nature of any employment in which he has been employed within the twelve months previous to the date of disablement as fixed by the certificate. Under sub-s. (f) a right of appeal is given from the certifying surgeon to the medical referee, and it is given if an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement. I am of opinion that the proper reading of those words is to give a right of appeal both to the employer and to the workman in either event. The grammatical construction of the language used does not restrict the appeal of the employer to the case of the surgeon giving the certificate and the appeal of the workman to the case of the surgeon refusing the certificate. In the ordinary course of language it would have been differently expressed if that had been the intention. In the present case, a certificate was given by the certifying surgeon, but the workman was aggrieved by his giving a certificate in the form in which it was given and by his refusing to give a certificate in the form which the workman desired.

In my opinion, the workman was a person aggrieved, and was entitled to appeal to the medical referee. Then that only takes him half the way that he has to go, because he is met by this—and this is Mr. Sankey's further point. Assuming that the workman is aggrieved and has a right of appeal, even then the medical referee cannot fix the date, because that right is only given to him by sub-s. 4 (a) in the case of an appeal against a refusal by a certifying surgeon to give a certificate. It is said that only in such a case can the date of disablement be determined by the medical referee. In my opinion, the present case is the case of an appeal against a refusal by a certifying surgeon. It is an appeal against his refusal to give a certificate which the

applicant desired, and which alone would entitle him to proceed for compensation under the Act. It is an appeal against the certifying surgeon's refusal to give a certificate of disablement fixing the date of it on the day on which the workman contends it ought to be fixed.

In my opinion the case is within sub-s. 4 (a) as an appeal against a refusal by a certifying surgeon. On these grounds I am of opinion that the appeal fails.

Appeal dismissed.

Solicitors: *M. A. Orgill, for Knight & Sons, Newcastle-under-Lyme; Stow, Preston & Co., for Hollinshead & Moody, Tunstall.*

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[IN THE COURT OF APPEAL.]

BULS *v.* OWNERS OF SHIP TEUTONIC.

[1913 No. 156.]

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July 11, 12.

Employer and Workman—Compensation—Seaman—Release under s. 136 of the Merchant Shipping Act, 1894—Effect upon Claim under the Workmen's Compensation Act, 1906—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 136, 137, 138—Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), s. 60.

Where a seaman on taking his discharge at the termination of a voyage signs a release, under s. 136 of the Merchant Shipping Act, 1894, "of all claims in respect of the past voyage," without reserving any claim under s. 60 of the Merchant Shipping Act, 1906, he is not thereby debarred from afterwards claiming from his employers, the shipowners, compensation under the Workmen's Compensation Act, 1906, in respect of injury by an accident which occurred during the voyage, but did not result in his incapacity for work until after the termination of the voyage.

APPEAL from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On December 18, 1912, the applicant, James Buls, while in the employment of the respondents as a fireman on board their ship *Teutonic*, sustained a burn upon his arm which he did not at the time regard as serious, nor did he report it. The voyage came

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to an end on December 21, 1912. On leaving the ship he got his discharge, received his wages, and signed a release of all his claims in respect of the past voyage in the terms of s. 136 of the Merchant Shipping Act, 1894, without reserving his claim for compensation under the Workmen's Compensation Act, 1906, as he might have done under s. 60 of the Merchant Shipping Act, 1906. (1) After leaving the ship his arm got worse, and he had to go to a hospital, where it was operated on, and he was unable to work until the end of February.

On February 8, 1913, he applied for an arbitration under the Workmen's Compensation Act, 1906, and the case was heard by the county court judge on March 14, 1913, when the objection was taken by the respondents that the applicant's claim was barred by the release which he had signed under s. 136 of the Merchant Shipping Act, 1894.

On March 18, 1913, the county court judge awarded the applicant compensation of 15s. 8d. a week from December 21, 1912, to February 11, 1913.

In the course of his judgment the county court judge said: "When one comes to look at the words of s. 136 I think it is obvious that it never was in contemplation that a claim of this kind should be covered by them. Of course at the time that the Merchant Shipping Act of 1894 was passed in which this s. 136 stands no such legislation existed as the Workmen's Compensation Act, 1906, and s. 136 was dealing with claims which

(1) Sect. 136 of the Merchant Shipping Act, 1894, provides as follows: "(1.) Where a seaman is discharged, and the settlement of his wages completed, before a superintendent, he shall sign in the presence of the superintendent a release, in a form approved by the Board of Trade, of all claims in respect of the past voyage or engagement; and the release shall also be signed by the master or owner of the ship, and attested by the superintendent. (2.) The release so signed and attested shall operate as a mutual discharge and settlement of all

demands between the parties thereto in respect of the past voyage or engagement"

Sect. 60 of the Merchant Shipping Act, 1906, provides as follows: "Notwithstanding anything in section 136 of the principal Act, a seaman may except from the release signed by him under that section any specified claim or demand against the master or owner of the ship, and a note of any claim or demand so excepted shall be entered upon the release. The release shall not operate as a discharge and settlement of any claim or demand so noted"

might properly be the subject of decision at the termination of the voyage before the superintendent. Such claims arose out of the common law rights of the seaman and his employer or any statutory rights that were superimposed on these common law rights at the time. Now the Workmen's Compensation Act, 1906, imposes an obligation on the employer altogether apart from any common law obligation. The right of the workman to compensation under the Act is not a right that springs out of his contract. It is not a right that arises out of any neglect or breach of duty on the part of the employer. It is not a right that arises out of any engagement between the workman and the employer. The obligation to pay compensation which is imposed by the statute upon the employer is in the nature of an insurance under which the workman injured in the course of his employment by accident arising out of his employment gets a certain scale of compensation. That is altogether independent of the terms of the agreement or the nature of the service and of any common law rights which the man may have. In my opinion a claim under the Act arising out of an accident, although it occurred on the voyage, is not a claim within the meaning of the words in s. 136 'in respect of the past voyage or engagement.' It is an accident, in respect of which the payment of compensation is imposed by the Workmen's Compensation Act, 1906, upon the employer. The only connection that this accident can be said to have with this voyage is that it happened in the course of the voyage, but it is impossible to include in the words of s. 136 a claim arising under the Workmen's Compensation Act. When one comes to look at the way in which claims should be settled under the Merchant Shipping Act, 1894, it seems obvious to me that a claim under the Workmen's Compensation Act is not a claim 'in respect of the past voyage or engagement.' The Workmen's Compensation Act provides the methods under which claims arising under it shall be settled and these methods are not consistent with the methods of the Merchant Shipping Act. It would be absolutely impossible for the superintendent at the termination of a voyage to decide what compensation a workman was entitled to in respect of an accident arising during the voyage or during his employment as a seaman under the

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 1913 for saying that it was never contemplated that such a construc-
 tion as is suggested should be put on a release under s. 136 of
 the Merchant Shipping Act.

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"In this case there is another point. At the time the applicant took his discharge the claim or demand had not arisen. At that time he had not been incapacitated for work, he continued to be able to work until the actual date of his discharge, and his incapacity arose during the course of the subsequent week. He had no claim at the moment of discharge against his employers. It is impossible for me to say that this statutory release, forced upon the applicant in this case, is to exclude him not only from a claim which has already arisen, but also from a claim which might arise in the future. He had no claim under the Workmen's Compensation Act during the voyage because he continued to receive his wages until he was discharged. His rights under the Workmen's Compensation Act, as has been shewn in the case of *Macdermott v. Owners of Tintoretto* (1), only came into operation after he had been paid off and discharged. My award is therefore in favour of the applicant."

From this award the employers appealed on the ground that the county court judge was wrong in law in holding that the applicant was entitled to compensation in spite of having signed a release under s. 136 of the Merchant Shipping Act, 1894, without excepting therefrom his claim for compensation pursuant to s. 60 of the Merchant Shipping Act, 1906, and in holding that the applicant's claim was not a claim or demand "in respect of the past voyage or engagement" within the meaning of s. 136.

J. Sankey, K.C., and E. Stewart Brown, for the appellants. At the time of the passing of the Merchant Shipping Act, 1894, there was no Workmen's Compensation Act. The Workmen's Compensation Act, 1897, did not apply to seamen, but they were included by s. 7 of the Act of 1906. Sect. 60 of the Merchant Shipping Act, 1906, was expressly enacted on account of the application of the Workmen's Compensation Act to

(1) [1911] A. C. 35.

seamen. The failure therefore of the applicant to except his claim under that Act from his release is a bar to such claim. The scheme and object of the Merchant Shipping Act, 1906, was to clear up all questions of claim as between a seaman and his employers. It is difficult to see for what purpose s. 60 was enacted if not for this.

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Rigby Swift, K.C., and *Bodel*, for the respondent, was not called upon.

KENNEDY L.J. I think this case is quite clear and that the judgment of the county court judge was absolutely right. The view of the whole Court is that the release relied upon by the employers is a release with reference to the rights arising out of the particular contract with the seaman. The release which is in statutory form governs the rights of the parties in relation to the particular work and to the particular rights arising out of the performance of the seaman's contract. The release like the discharge seems to me to have relation only to the particular contract of service of the seaman as a seaman with regard to which the superintendent is, under the Merchant Shipping Acts, the person before whom the seaman is discharged. I do not think it necessary to repeat, although I agree with it, the view taken by the county court judge as to the difficulty of considering a seaman's rights under the Workmen's Compensation Act, 1906, at the time when he is being paid off. It is unnecessary to consider that point here. I think the appeal must be dismissed.

COZENS-HARDY M.R. I am of the same opinion.

SWINFEN EADY L.J. I agree.

Appeal dismissed.

Solicitors: *Hill, Dickinson & Co., Liverpool; R. Mills Roberts, Liverpool.*

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[IN THE COURT OF APPEAL.]

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July 15.

DIGHT v. OWNERS OF SHIP CRASTER HALL.

Employer and Workman — Compensation — Time for taking Proceedings — Seaman — Absence from the United Kingdom — “Occasioned by” — Possibility of Return within Six Months — Workmen’s Compensation Act, 1906 (6 Edw. 7, c. 58), s. 2, sub-s. 1 (b).

A sailor employed on board a ship on the west coast of South America met with an accident in October, 1910, as a result of which he sustained a severe wound on the head. The captain took him on shore and had the wound stitched up, but he did not recover, and was eventually discharged. He went to various hospitals in America, but in vain, and was sent back to England in September, 1912, as a distressed seaman. In November, 1912, he made a claim for compensation under the Workmen’s Compensation Act, 1906, and the county court judge found that his failure to make a claim within six months was “due to” his absence from the United Kingdom although he might have returned to England as a distressed seaman in time to make a claim within six months from the date of the accident, as provided by s. 2, sub-s. 1 (b), of the Act:—

Held, that no distinction could be drawn between the words “due to” used by the judge and the language of the Act “occasioned by”; that whether the workman’s delay in claiming was occasioned by absence from the United Kingdom or not was a question of fact to be decided by the judge; and that the applicant ought not to be precluded from obtaining compensation because he had stuck to his work.

APPEAL from an award of the judge of the Whitechapel County Court sitting as arbitrator under the Workmen’s Compensation Act, 1906.

Harry Dight was a sailor employed on the ship *Craster Hall*. Whilst serving on board on the west coast of South America he met with an accident on October 29, 1910, arising out of and in the course of his employment. As a result of this accident he received a wound on his head which was so severe that the captain took him on shore at the first port reached by the ship and had his wound stitched up, and again at another port to have the stitches taken out again. After this he did a little light work, but became too ill to work at all, and was discharged at Baltimore. He went to New York and saw the captain again, but was not allowed to return on board the ship. He went to

the Marine Hospital at New Orleans and then to the Baltimore Marine Hospital, and to the John Hopkins Hospital in Baltimore, where the operation of trepanning was performed on him; and he was sent to a convalescent home. There he had fits and was sent back to the John Hopkins Hospital, from which he was sent to England as a distressed seaman, arriving in September, 1912. On his return he lived at first at the Whitechapel Infirmary, and was now living at the Catholic Sailors' Home in Welclose Square. On November 8, 1912, he served notice of a claim for compensation for his injuries and claimed 15s. 6d. a week from the date of his arrival in England and during incapacity.

The county court judge found "that the applicant met with this accident and that his incapacity in consequence of it began on the ship." This finding disposed under s. 7, sub-s. 1 (a), of the objection that the notice was insufficient.

The judge also found "that his failure to make a claim within six months was due to his absence from the United Kingdom; but that for the two months that he was in New York, for the time (probably two months) that he was on the *Craster Hall*, and for the two months he was with Miss Barnewell he could as a distressed seaman have come to England, and if he had so come to England from New York he could have claimed within six months. The respondents' point was that as he could have come to England his failure to claim within six months cannot in law be said to be occasioned by his absence from the United Kingdom. Award for applicant for 15s. 6d. a week from September 13."

The employers appealed on the ground that the applicant did not make his claim for compensation within six months of the accident.

A. Neilson, for the appellants. By s. 2, sub-s. 1 (1), of the Workmen's Compensation Act, 1906, a claim for compensation

(1) Workmen's Compensation Act, 1906, s. 2: "Time for taking proceedings.—(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the

accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with

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must be made within six months from the occurrence of the accident, unless, under sub-s. 1 (b), the failure to make a claim within that period is occasioned by mistake, absence from the United Kingdom, or other reasonable cause. "Absence from the United Kingdom" means the absence of the workman because it was impossible for him to return. He cannot take advantage of sub-s. 1 (b) if he stays abroad voluntarily. The county court judge found that the delay was "due to his absence." The words "due to" refer to voluntary absence, whereas "occasioned by" means compulsory absence. Here the judge has found that the applicant might have returned in time. It cannot be that a workman may stay away as long as he pleases and make a claim on his return. He might take up some other form of employment and remain abroad for years. The result would be that employers would have great difficulty in collecting the necessary evidence. This man might have made a claim by letter, but he omitted to do so.

D. H. J. Hartley, for the applicant, was not called upon to argue.

COZENS-HARDY M.R. This is said to be a very important case, but, speaking for myself, I have no hesitation in saying that it is also a very clear case. The applicant was a sailor who met with an accident while employed on the ship *Craster Hall* in October, 1910. At the time the ship was on the west coast of South America and the precise place where the accident happened does not appear. As a result of the accident the man sustained a wound on his head which was so severe that the captain had to take him on shore after the accident to have his head stitched up, and again at a later date to have the stitches removed, and finally a severe operation had to be performed. Speaking with practical accuracy, the man has been a hospital patient almost

respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

"Provided always that—

"(b) the failure to make a claim

within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

ever since the accident and he is so to-day. He reached England in September, 1912, and made his claim for compensation in November. It is said that he is not entitled to maintain a claim because he did not make it within six months. The question for us is whether the case is not covered by the words of s. 2, sub-s. 1 (b), of the Workmen's Compensation Act, 1906: "the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by absence from the United Kingdom." The county court judge has found that the case comes within that provision. Counsel for the appellants argues that it does not, because the man might have asked to be sent back to England as a distressed seaman and have made his claim within six months, and he says that there were three periods in which the man could have insisted on being brought back. In my opinion the county court judge was quite right in saying that the failure to make a claim was "due to" the man's absence from the United Kingdom. Some reliance was placed on the fact that he used the expression "due to" instead of the words of the Act "occasioned by"; but he used "due to" in one part of his judgment, and "occasioned by" in another part, and in my opinion he did not intend to make any distinction between them. In each case it is for the county court judge to consider as a question of fact whether the failure to make a claim was occasioned by absence from the United Kingdom. If this man had recovered from the effects of the accident and had gone into another occupation than that of a sailor the judge might well have said that the failure was not really due to his absence from the United Kingdom, but to his being engaged in another sphere of life and not choosing to come home. Here we are dealing with a man who was desirous of continuing his life as a sailor, and I should be very slow to say in such a case that he was precluded from obtaining compensation because he had stuck to his work and did not return to England at once.

I think the county court judge was fully justified in taking the view he did. I might almost go as far as to say that we should probably have held him to be wrong if he had taken the contrary view. The appeal must be dismissed with costs.

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KENNEDY L.J. I am of the same opinion. The Act provides that failure to make a claim within six months is not to be a bar "if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." It is a question of fact whether when the claim is not made within that time the case comes within those words. Here I think it does. The man sustained serious injuries to his head whilst serving on a ship on the west coast of South America, and after the ship arrived at its port he was taken from hospital to hospital. He might, it is true, have returned in time to make his claim within the six months if he had then elected to come back to England as a distressed seaman in a damaged condition. Instead of doing that he sought to be cured in hospitals in America. Is the fact that he endeavoured to be cured there instead of returning home at once sufficient to enable the employers to say that the failure to make a claim was not occasioned by absence from the United Kingdom? That was, I think, a question for the county court judge. I do not think that his decision ought to be interfered with.

I do not think it would be right to hold that because the man did not adopt a course which would have brought him back to this country as a sick man he must therefore be deprived of the protection of s. 2, sub-s. 1 (b). The words of the provision must be interpreted according to the particular circumstances, and with due regard to the intention of the Act that there should be a statutory extension of the time for making a claim.

SWINFEN EADY L.J. I am of the same opinion. The county court judge finds that the workman's failure to make a claim was "due to" his absence from the United Kingdom, that is was "occasioned by . . . absence from the United Kingdom." In the present case the facts are such as to explain the reason of the man's absence for so long a time. He was injured, he thinks at Valparaiso, and taken on shore for medical assistance. He returned on board his ship to Baltimore, being able to do some light work with difficulty. He then went to New York, where he saw the captain of his ship, who refused to take him back.

Subsequently he spent his time in going from hospital to hospital; first he was at the Marine Hospital at New Orleans, and subsequently at the Baltimore Marine Hospital, and the John Hopkins Hospital. There he was operated on, and was then sent to a convalescent home; but he had fits there, and was sent back to the John Hopkins Hospital. It was from Baltimore that he returned home ultimately as a distressed seaman. While in America he only did light work round the hospitals, and the county court judge does not find that he could work during that time, but says that there were three periods when the man could have returned home as a distressed seaman.

On the facts of the case I am of opinion that not only was the failure to make a claim "occasioned by . . . absence from the United Kingdom," as the county court judge has found, but that the absence for so long a time was fully explained by the results of the accident.

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Appeal dismissed.

Solicitors for appellants: *Botterell & Roche.*
Solicitor for respondent: *Charles H. Downes.*

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[1912 F. 1461.]

Parliament—House of Commons—Disqualification—Contract on Account of Public Service—Action for Penalties—Venue—Affidavit of Informer—Claim based on Wrong Statute—Amendment of Writ—Claim barred by prior Writ—Evidence—Test Roll of House of Commons—Return Book—Return of Writ of Election—Official Copy of Division Lists—Partnership Deed—21 Jac. 1, c. 4, s. 3—House of Commons (Disqualification) Act, 1782 (22 Geo. 3, c. 45), ss. 1, 2, 9—House of Commons (Disqualification) Act, 1801 (41 Geo. 3, c. 52), ss. 1, 6.

By s. 1 of 21 Jac. 1, c. 4, all offences against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of assize, justices of nisi prius or gaol delivery, justices of oyer and terminer, or justices of the peace in their general or quarter sessions shall be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment before the justices of assize, justices of nisi prius, justices of oyer and terminer, and justices of gaol delivery, or before the justices of the peace of every county, city, borough, or town corporate and liberty, having power to inquire of, hear, and determine the same within this realm of England or dominion of Wales, wherein such offences shall be committed in any of the Courts, places of judicature, or liberties aforesaid respectively only at the choice of the parties which shall or will commence suit or prosecute for the same, and not elsewhere, save only in the said counties or places usual for those counties, or any of them; and all and all manner of informations, actions, bills, plaints, and suits whatsoever, hereafter to be commenced, sued, prosecuted, or awarded, either by the Attorney-General of His Majesty, his heirs or successors for the time being, or by any officer or officers whatsoever for the time being, or by any common informer or other person whatsoever, in any of His Majesty's Courts at Westminster, for or concerning any of the offences, penalties, or forfeitures aforesaid, shall be void and of none effect. By s. 3, no officer or minister in any Court of record shall receive, file, or enter of record any information, bill, or plaint, count or declaration, grounded upon the said penal statutes or any of them which before by this Act are appointed to be heard and determined in their proper counties, until the informer or relator hath first taken a corporal oath before some of the judges of that Court that the offence or offences laid in such information, action, suit, or plaint was or were not committed in any other county than where by the said information, bill, plaint, count, or declaration the same is or are supposed to have been committed, and that he believeth in his conscience the offence was committed within a year before the information or suit within the same

county where the said information or suit was commenced; the same oath to be there entered of record.

By the House of Commons (Disqualification) Act, 1782, s. 1, any person who shall directly or indirectly himself or by any person on his account undertake, execute, hold or enjoy in whole or in part any contract made or entered into with certain named officers of State or with any other person or persons whatsoever for or on account of the public service, shall be incapable of being elected or of sitting or voting as a member of the House of Commons during the time that he shall execute, hold, or enjoy any such contract or any part or share thereof. By s. 2, if any member of the House of Commons shall similarly undertake any contract as aforesaid the seat of such person in the House of Commons shall be and is declared to be void. By s. 9, if any person disabled or declared incapable to sit or vote in Parliament shall be returned as a member the election and return are declared to be void; "and if any person disabled and declared incapable by this Act to be elected shall . . . presume to sit or vote as a member of the House of Commons, such person so sitting or voting shall forfeit the sum of 500*l.* for every day in which he shall sit or vote in the said House to any person or persons who shall sue for the same in any of His Majesty's Courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said Courts, by any action of debt, bill, plaint or information":—

Held, that the provision in s. 9 of the Act of 1782 requiring the plaintiff to sue for the penalty "in any of His Majesty's Courts at Westminster" was inconsistent with the provisions of 21 Jac. 1, c. 4, requiring actions for offences against penal statutes to be commenced in the county in which the offence was committed, and that therefore those provisions of the Act of 21 Jac. 1, c. 4, did not apply to an action for penalties under the Act of 1782, and an affidavit as to venue was not necessary.

Semble Order xxxvi., r. 1, of the Rules of the Supreme Court, 1883, abolishing local venues has the effect of repealing ss. 1—3 of 21 Jac. 1, c. 4.

By s. 1 of the House of Commons (Disqualification) Act, 1801, all persons disabled from or incapable of being elected or sitting and voting in the House of Commons of any Parliament of Great Britain shall be disabled from and incapable of being elected or sitting and voting in the House of Commons of any Parliament of the United Kingdom. By s. 6, if any person declared to be disabled from or rendered incapable of sitting or voting in the House of Commons shall be elected or returned as a member to serve in Parliament for any place in the United Kingdom such election or return are declared to be void; "and if any person or persons so hereafter elected or returned and declared to be disabled or to be rendered incapable by this Act to be elected, shall presume to sit or vote as a member of the said House of Commons, such person or persons so sitting or voting shall incur such pains, penalties, and forfeitures, as are inflicted or imposed by the

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several Acts of Parliament, heretofore passed in Great Britain or Ireland for disabling or incapacitating such persons from sitting in the Parliaments of Great Britain or Ireland respectively."

The defendant, being a partner in a firm of bankers and bullion brokers, was elected a member of the House of Commons. After his election and while he was still a member of Parliament, the firm entered into contracts to supply silver to the Secretary of State for India in Council. On various occasions while the firm was executing the contracts the defendant sat and voted in the House of Commons:—

Held, that he was liable to penalties under the House of Commons (Disqualification) Act, 1801.

The writ in the action was issued on November 9, 1912. Another writ claiming penalties for the same offences was issued on November 8, 1912:—

Held, that the right to penalties attached to the person who issued the first writ and that the present plaintiff had no right of action.

Chalchman v. Wright (1604) Noy, 118; *Girdlestone v. Brighton Aquarium* (1878) 3 Ex. D. 137, followed.

The writ and statement of claim in both actions claimed penalties under the Act of 1782:—

Held, that the penalties were recoverable, if at all, under the Act of 1801 and not under the Act of 1782, and that in the circumstances the plaintiff should not be allowed to amend his writ and statement of claim so as to claim under the later Act.

The test roll of the House of Commons and the official copy of the division lists,

Held, admissible in evidence.

As to the return book, *quære*.

The best evidence of membership of the House of Commons is the return of the writ of election with the returning officer's indorsement thereon.

A member of the firm in which the defendant was a partner was called upon subpoena to produce the deed of partnership. This he objected to do on the ground that the deed was in the joint possession of the partners and that his co-partners, one of whom had not been subpoenaed and was not before the Court, objected to the production. The deed had been executed in multiple and each partner had the right to possession of a duly executed copy:—

Held, that the witness was bound to produce his copy.

Attorney-General v. Wilson (1839) 9 Sim. 526; *Crowther v. Appleby* (1873) L. R. 9 C. P. 23; *Kearsley v. Philips* (1882) 10 Q. B. D. 36, distinguished.

Rex v. Daye [1908] 2 K. B. 333, applied.

TRIAL of action before Scrutton J. without a jury.

The writ was issued on November 9, 1912. It was in these terms:—

"The plaintiff's claim is for £6,500*l*, forfeited by the defendant

sitting and voting in the House of Commons after the defendant had become incapable of being elected or of sitting or voting as a member of the said House of Commons contrary to the provisions of the statute 22 Geo. 3 c. 45 (1) in such case made and provided."

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The statement of claim was dated November 30, 1912, and was in the following terms:—

"1. The defendant was at all material times a partner in or otherwise beneficially interested in the profits of the firm of Samuel Montagu & Co. which carries on business as bankers and bullion brokers in the City of London and elsewhere.

"2. The defendant contrary to the form of the statute in that behalf namely the statute 22 Geo. 3 c. 45 directly by himself or indirectly by the said firm and the members thereof acting in trust for him or for his use or benefit or on his account has undertaken executed held and enjoyed in the whole or in part certain contracts agreements or commissions made or entered into with some other person or persons for or on account of the public service ^{and}_{or} has knowingly and willingly furnished or provided in pursuance of such contracts agreements or commissions wares or merchandise to be used or employed in the service of the public and during all material times has executed held or enjoyed such contracts agreements or commissions or a part or share thereof and the benefits or emoluments arising from the same.

"3. By reason of the premises the defendant as from the 5th day of March 1912 became disabled and incapable of being elected or sitting or voting as a member of the House of Commons.

"4. Notwithstanding the matters aforesaid the defendant has presumed to sit and vote in and as a member of the House of Commons on divers occasions since the 5th day of March 1912 and thereby has forfeited the sum of 500*l.* for every day on which he so sat and voted. The number of days on which the defendant has sat or voted as aforesaid is thirty-five.

"Particulars of Paragraph 2.

"Samuel Montagu & Co. on the 5th day of March entered into a contract or agreement with or accepted a commission from the

(1) See note on p. 741, post.

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Secretary of State for India or the agents duly authorized of such Secretary whereby for reward they agreed to purchase on his behalf or supply to him certain quantities of silver to the extent of 500,000*l.* or thereabouts to be used or employed in the public service which silver was purchased for or supplied to him by the said firm in accordance with the said contract agreement or commission and the said firm has duly received the reward payable as aforesaid. Similar contracts or agreements or commissions were made for different amounts of silver on or about the 26th day of March 1912 the 16th day of April 1912 the 21st day of May 1912 the 1st day of June 1912 the 21st day of June 1912 the 27th day of June 1912 the 30th day of July 1912 the 10th day of August 1912 the 29th day of August 1912 the 4th day of September 1912 and the 11th day of September 1912 and were duly carried out and the said firm has received its reward payable thereunder. The said contracts agreements or commissions were partly by letters on or about the dates mentioned and partly by telephone messages and partly by word of mouth.

“Particulars of Paragraph 4.

“The defendant sat and voted in the House of Commons on the 21st, 26th and 28th days of March the 16th and 29th days of April the 3rd and 9th days of May the 12th, 18th, 19th, 24th, 27th and 28th days of June the 3rd, 5th, 12th, 17th, 18th, 25th, 26th, 29th and 31st days of July the 5th, 15th, 16th, 17th, 21st, 22nd, 24th, 28th, 29th and 31st days of August(1) and the 1st, 4th and 5th days of November 1912.

“The plaintiff claims 17,500*l.*”

The defendant pleaded that under and by virtue of the public general Act 21 Jac. 1, c. 4, s. 4 (2), he was not guilty.

May 8. *Duke, K.C. (Danckwerts, K.C., H. A. McCardie, and E. L. Barnes with him)*, for the defendant. There is a preliminary objection to the maintenance of this action. The

(1) The dates from the 15th to the error named as days of August 31st inclusive were by a clerical instead of October.

(2) See note on p. 714, post.

action is brought under a penal statute—the House of Commons (Disqualification) Act, 1782, s. 9—to recover penalties from the defendant. In such a case the Act 21 Jac. 1, c. 4 (1), applies. Sect. 1 provides that the action must be brought in the county where the offence is committed; by s. 2 the offence must be alleged and proved to have been committed within the county where the offence was in truth committed; and by s. 3 the plaintiff must make and file an affidavit that the offence was not committed in any other county than where by the information, bill, plaint, count, or declaration the same is supposed to have been committed, and that he believeth in his conscience the offence was committed within a year before the information or suit within the same county where the said information or suit was commenced. No such affidavit has been filed. It is a condition precedent to the maintenance of the action.

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Gore-Browne, K.C., and A. Neilson, for the plaintiff. Sects. 1, 2, and 3 of 21 Jac. 1, c. 4, only apply to penal statutes which were then in existence and not to subsequent penal statutes: *Rex v. Gaul* (2); *Hicks's Case* (3); *French v. Coxon* (4); *Barber v. Tilson* (5); Buller's Nisi Prius, 1st ed., p. 191; 7th ed., pp. 195, 196; Tidd's Practice, 9th ed., vol. 1, p. 430; Selwyn's Nisi Prius, 2nd ed., vol. 1, p. 664; 12th ed., vol. 1, p. 635; Bullen and Leake's Precedents, 3rd ed., p. 232. Sect. 4, which allows the defendant to plead the general issue, is an exception to the rule above stated and applies to subsequent penal statutes: *Earl Spencer v. Swannell* (6); *Jones v. Williams* (7); Bullen and Leake's Precedents, 3rd ed., p. 704; Chitty's Statutes, 5th ed., vol. 9, tit. Penal Actions, p. 10. In *Earl Spencer v. Swannell* (8) Parke B., who delivered the judgment of the Court, adopted the view that ss. 1—3 of 21 Jac. 1, c. 4, do not apply to subsequent statutes, and he treated the resolutions of the judges in *Rex v. Gaul* (2) and *Hicks's Case* (3) as settling the law, though

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| (1) See note on p. 739, post. | (5) (1815) 3 M. & S. 429, at |
| (2) (1699) 1 Salk. 372. | pp. 438, 439, 443. |
| (3) (1699) 1 Salk. 373. | (6) (1838) 3 M. & W. 154, at |
| (4) (1737) 2 Str. 1081; Andr. 25 | p. 165. |
| (sub nom. <i>French v. Cockran</i>). | (7) (1838) 4 M. & W. 375. |
| (8) 3 M. & W. 154. | |

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he seems to suggest that the reason is because each subsequent statute "which imposes a penalty to be recovered in the superior Courts gives a new remedy to which the statute of James does not apply." (1) That suggested ground is that the subsequent Act is inconsistent with the provisions as to venue in 21 Jac. 1, c. 4. That observation applies to this case where by s. 9 of the House of Commons (Disqualification) Act, 1782, the penalty is to be sued for in one of His Majesty's Courts at Westminster. Further, the Act 21 Jac. 1, c. 4, "does not control any of those statutes on which penal actions are to be brought in the superior Courts": *Leigh v. Kent* (2), doubting *White v. Boot*. (3) But even if it does apply, s. 3 is merely directory to the officer of the Court: *Leigh v. Kent*. (2)

Next, Order xxxvi., r. 1, of the Rules of the Supreme Court, 1883, has abolished all local venues for the trial of actions, "except where otherwise provided by statute"; and these latter words only refer to local venues created by statutes passed since the Judicature Act, 1875: *Buckley v. Hull Docks Co.* (4) The preliminary objection therefore cannot prevail.

Duke, K.C., in reply. The resolutions of the judges in *Rex v. Gaul* (5) and *Hicks's Case* (6), however weighty they may be, are not decisions of a Court, and therefore are not of binding authority. They are not consistent with the subsequent case of *Earl Spencer v. Swannell* (7), which said that 21 Jac. 1, c. 4, applies unless there is some provision in the subsequent penal Act which is inconsistent with it. In each case one must see if the subsequent penal Act contains a provision inconsistent with the Act of James. *French v. Coxon* (8) was expressly decided upon the resolutions of the judges in *Rex v. Gaul* (5) and *Hicks's Case* (6), which are not now law since *Earl Spencer v. Swannell*. (7) The same observation applies to the decisions in *Attorney-General v. Browse* (9) and *Harris v. Reney*. (10) Sect. 9 of the Act of 1782, under which this action is brought, does not contain any

(1) 3 M. & W. at p. 165.

(7) 3 M. & W. 154.

(2) (1789) 3 T. R. 362, at p. 364.

(8) 2 Str. 1081; Andr. 25.

(3) (1788) 2 T. R. 274.

(9) (1727) Bunb. 236.

(4) [1893] 2 Q. B. 93.

(10) (1734) 2 Barnard. K. B. 413,

(5) 1 Salk. 372.

420; Cunn. 30.

(6) 1 Salk. 373.

provision which is inconsistent with the provisions of s. 3 of 21 Jac. 1, c. 4. The provision as to bringing the action in the Courts at Westminster does not relieve the common informer of the obligation to make an affidavit as to the place where and time when the offence was committed. *White v. Boot* (1) is an instance where an action was stayed under the provisions of s. 3 of 21 Jac. 1, c. 4, though no doubt the action was brought upon a statute passed antecedently thereto, and the observations upon that case in *Leigh v. Kent* (2) were obiter, the objection in this latter case having been taken after verdict and therefore too late. In *Dyer v. Best* (3) it was held that the statute 31 Eliz. c. 5, which contains somewhat similar provisions to those in 21 Jac. 1, c. 4, applied to all penal actions, though passed subsequently. As appears from the recitals in 21 Jac. 1, c. 4, the Act was intended to remedy the grievance of a person being forced to appear at the suit of a common informer for a penalty in one of the Courts at Westminster, and that Act applies to all penal statutes even though passed subsequently, unless the later Act is inconsistent with the provisions of the earlier Act. In *Barber v. Tilson* (4) and *Whitehead v. Wynn* (5) the question turned upon the construction of 31 Eliz. c. 5, though Lord Ellenborough C.J. in the former case fell into the error of saying that 21 Jac. 1, c. 4, did not relate to subsequent statutes. The true rule is, as appears from the judgment of the Court of Exchequer delivered by Parke B. in *Earl Spencer v. Swannell* (6), that the Act of James does not apply where the provisions of the subsequent penal Act are inconsistent with it. The two Acts must be read together, and if the subsequent Act excludes local venue the Act of James is to that extent not applicable.

Sect. 1 of 21 Jac. 1, c. 4, founds the local jurisdiction, and s. 2 provides that in all bills, counts, complaints, and declarations the offence shall be laid and alleged to have been committed in the county where it was in truth committed; and by s. 3 the informer must make the affidavit there specified. There is not such an inconsistency between the provisions of that Act and

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(1) 2 T. R. 274.

(4) 3 M. & S. 429.

(2) 3 T. R. 362.

(5) (1816) 5 M. & S. 427.

(3) (1866) L. R. 1 Ex. 152.

(6) 3 M. & W. 154.

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the provisions of the Act of 1782 as to deprive the defendant of the protection of s. 3 of the earlier Act.

SCRUTTON J. In this case the plaintiff sues the defendant for penalties under s. 9 of the House of Commons (Disqualification) Act, 1782, for having sat and voted as a member of the House of Commons at a time when he was incapacitated from sitting or voting by reason of his interest in a contract. Counsel for the defendant, before the case was opened, took the preliminary objection that the action was not maintainable upon the ground that the plaintiff had not taken a corporal oath that the offences were not committed in any other county than where the same were alleged to have been committed, and that he believed in his conscience that the offence was committed within a year before the suit within the same county where the said suit was commenced. That objection is based upon s. 3 of 21 Jac. 1, c. 4, and I have been referred to a number of authorities in which the effect of that Act has been considered. The first part of s. 3 provides that "no officer or minister in any Court of record shall receive, file, or enter of record any information, bill or plaint, count or declaration, grounded upon the said penal statutes or any of them which before by this Act are appointed to be heard and determined in their proper counties," until the informer or relator hath first taken the oath referred to above. To ascertain what "the said penal statutes" are I must refer back to s. 1. That section recites that "whereas the offences against divers and sundry penal laws and statutes of this realm may better and with more ease and less charge to the subject be commenced, sued, informed against, prosecuted, and tried in the counties where such offences shall be committed; and whereas the poor Commons of this realm are grievously charged, troubled, vexed, molested, and disturbed by divers troublesome persons commonly called relators, informers, and promoters, by prosecuting and enforcing them to appear in His Majesty's Courts at Westminster, and to answer offences supposed by them to be committed against the said penal laws and statutes, or else to compound with them for the same; For remedy whereof be it enacted . . . that all offences hereafter to be committed against

any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of assize, justices of nisi prius or gaol delivery, justices of oyer and terminer, or justices of the peace in their general or quarter sessions, shall after the end of this present session of Parliament be commenced, sued, prosecuted, tried, recovered, and determined" in the counties or boroughs wherein such offences shall be committed and not elsewhere. The grievance which Parliament intended to remedy by that enactment was that common informers had the option of suing for penalties under penal statutes either in the Courts at Westminster or in the county where the offence was committed, and common informers had vexed persons by suing them at Westminster which involved in many cases a long and troublesome journey in those days. Parliament accordingly enacted that the common informer must proceed in the county in which the offence was committed, and s. 3 provides for an affidavit being made by the person suing.

Now, from an early time objections under this Act have been taken to the maintenance of actions to recover penalties under penal statutes, and the judges have expressed various opinions as to the meaning of ss. 1—3 of the Act. In many of the earlier authorities the judges expressed the opinion that those sections did not apply to penal statutes passed after that Act. In *Rex v. Gaul* (1) there was a resolution of the majority of the judges that "the 21 Jac. c. 4 does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby; but that statute is as to them, as it were, repealed pro tanto"; and in other cases to which I have been referred, of which *French v. Coxon* (2) and *Harris v. Reney* (3) are instances, the Courts professing to follow the law as so stated in the resolution of the judges have put the matter in that comprehensive way. It may be that the justification for that view is that stated by Le Blanc J. in *Barber v. Tilson* (4), namely, "the judges probably thought that the

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(1) 1 Salk. 372.

(3) 2 Barnard. K. B. 413, 420;

(2) 2 Str. 1081; Andr. 25.

Cunn. 30.

(4) 3 M. & S. 429, at p. 443.

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statute, on account of its narrowing the jurisdiction of the Courts above, and of the Attorney-General, ought not to receive a more extended construction than the language of it required." It may be that for that reason the judges have said that "any penal statute" in 21 Jac. 1, c. 4, meant any then existing penal statute. There are also cases in which the judges have taken a more limited view of the Act of James, and have said that it does not apply where the provisions of the statute creating the offence are inconsistent with it. This view is expressed by Le Blanc J. in *Barber v. Tilson* (1) as an alternative one to that which I have quoted above: "or probably for the reason which is adopted in Buller's *Nisi Prius* (2), that where a subsequent statute gives an action of debt, or other remedy for the recovery of a penalty, in any Court of record generally, it so far impliedly repeals the 21st of Jac." This alternative view of the statute is that stated by Parke B. in *Earl Spencer v. Swannell* (3), where, after pointing out that the first three sections of the Act were intended to remedy the mischief recited in the preamble by taking away the power to sue for the penalty in the superior Courts, he said that "it has been frequently held that every subsequent statute which imposes a penalty to be recovered in the superior Courts gives a new remedy to which the statute of James does not apply"; and for that he cites *Rex v. Gaul* (4) and *Hicks's Case*. (5) In the present case by s. 9 of the Act of 1782 the penalty is to be forfeited to the person "who shall sue for the same in any of His Majesty's Courts at Westminster." It is quite possible that I should not go so far as to say that every penal Act passed subsequently to 21 Jac. 1, c. 4, is excluded from its operation. It is not necessary to go so far as that. It is sufficient for me to say that the provision in s. 9 of the Act of 1782 that the penalty shall be sued for in an action of debt, bill, plaint, or information in any of the Courts at Westminster is inconsistent with the provision in s. 1 of 21 Jac. 1, c. 4, that an action shall not be brought in any of His Majesty's Courts at Westminster. This latter section contains a provision that "all

(1) 3 M. & S. 429, at p. 443.

(3) 3 M. & W. 154, at p. 165.

(2) 1st ed., p. 191; 7th ed., pp. 195,
 196.

(4) 1 Salk. 372.

(5) 1 Salk. 373.

and all manner of informations, actions, bills, complaints, and suits whatsoever, hereafter to be commenced, sued, prosecuted, or awarded, either by the Attorney-General of His Majesty, his heirs or successors for the time being, or by any officer or officers whatsoever for the time being, or by any common informer or other person whatsoever, in any of His Majesty's Courts at Westminster, for or concerning any of the offences, penalties, or forfeitures aforesaid, shall be void and of none effect." That seems to me to be inconsistent with the provisions of the Act of 1782.

Other cases have been cited where no affidavit has been filed, but I do not think that they throw any further light upon the matter. *White v. Boot* (1) was an action to recover a penalty under an Act passed before 21 Jac. 1, c. 4, and *Leigh v. Kent* (2), in which the decision in *White v. Boot* (1) was doubted, was also an action on a penal statute passed before the Act of James, but the objection was taken after verdict. It seems to me that there is ample authority for the proposition that the Act of James does not apply to a penal statute passed subsequently. There is also authority for the proposition, which seems more intelligible to me, that, where a subsequent penal Act gives a remedy which is inconsistent with the Act of James, the latter pro tanto does not apply. That is the view taken by Parke B. in *Earl Spencer v. Swannell* (3), and by Le Blanc J. in the alternative reason which he gave in *Barber v. Tilson* (4), and it binds me. The preliminary objection therefore is not well founded.

Further, local venues have been abolished: Order xxxvi., r. 1; *Buckley v. Hull Docks Co.* (5); and that would seem to have the effect of repealing ss. 1—3 of 21 Jac. 1, c. 4, as to venue.

Objection overruled.

W. F. B.

Duke, K.C., Danckwerts, K.C., McCardie, and E. L. Barnes, for the defendant. This statement of claim discloses no cause of action. It is based upon the House of Commons (Disqualification)

(1) 2 T. R. 274.

(2) 3 T. R. 362.

(3) 3 M. & W. 154, at p. 165.

(4) 3 M. & S. 429, at p. 443.

(5) [1893] 2 Q. B. 93.

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Act, 1782 (22 Geo. 3, c. 45), a statute relating to the Parliament of Great Britain. That statute since the passing of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), has ceased to be operative. The penalties claimed, if recoverable at all, are recoverable under the House of Commons (Disqualification) Act, 1801 (41 Geo. 3, c. 52). That statute has not been pleaded. In a penal action if the plaintiff bases his claim expressly upon a statute he must at his own risk declare upon the correct statute, for the Court will "hold him to half a letter": *Boyce v. Whitaker* (1); *King v. Marsack* (2); *Lee v. Clarke* (3); *Fife v. Bousfield* (4); Bacon Abr., Actions Qui Tam B. (7th ed., vol. 1, p. 74); Com. Dig., Action upon Statute (G), (H), (I).

Prima facie where a statute creates an offence and imposes a penalty, but is silent as to who is to recover it, the Crown alone can maintain a suit for it: *Bradlaugh v. Clarke*. (5) If a common informer sues he must shew on his pleadings the statute enabling him; otherwise his pleading is bad. In a penal action no amendment should be allowed: *Wright v. Ager*. (6)

Gore-Browne, K.C., and *A. Neilson*, for the plaintiff. Whatever may have been the practice before the Judicature Acts, at the present day the plaintiff need only state the facts on which he relies. The Court is bound to take notice of public statutes, as indeed it always was: *Lee v. Clarke*. (3)

Secondly, if an amendment is necessary it ought to be made. By Order xxviii., r. 1, of the Rules of the Supreme Court, 1883, "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." The amendment could not involve any injustice to the defendant whether by surprise or otherwise.

Duke, K.C., in reply. This is in the nature of a criminal proceeding where the Court has no such wide discretion as to amendment as it has in purely civil actions. The plaintiff has no merits. He sues on the bare words of the statute and has no claim on the indulgence of the Court: *Ex parte Swift*. (7)

(1) (1779) 1 Doug. 94.

(4) (1844) 6 Q. B. 100.

(2) (1796) 6 T. R. 771.

(5) (1883) 8 App. Cas. 354.

(3) (1802) 2 East, 333.

(6) (1821) 5 Moo. (J.B.) 330.

(7) (1835) 3 Dowl. 636.

SCRUTTON J. reserved judgment on this point until the rest of the case had been heard.

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The Financial Secretary of the India Office produced on subpoena a number of letters from a firm of S. Montagu & Co. which shewed that on certain dates in each of the months from March to October, 1912, inclusive the firm were engaged in purchasing on behalf of and supplying to the Secretary of State for India in Council large quantities of silver.

With a view to proving that the defendant had sat and voted in the House of Commons while the firm of S. Montagu & Co. were executing contracts for the supply of silver, an assistant clerk from the House of Commons was called who said that he had the leave of the House to attend and give evidence.

Duke, K.C., for the defendant, objected that the leave of the House must be in writing and produced by the witness.

The witness having stated in answer to SCRUTTON J. that he was ready and willing to give evidence was held by the learned judge to be an admissible witness. The case of *Chubb v. Salomons* (1) was referred to. The witness then produced the test roll of the members of the House of Commons elected in December, 1910. He stated that it was the practice for every member of the House of Commons to sign this roll. The witness himself did not know, and therefore could not identify, the signature of the defendant. This was afterwards done by another witness. The witness then produced the return book for the House of Commons elected in December, 1910. In the Journal of the House was a statement that on Tuesday, January 31, 1911, being the day of the first meeting of the Parliament elected in December, 1910, this return book had been handed by the Clerk of the Crown in Chancery to the Clerk of the House of Commons.

Danckwerts, K.C., for the defendant, objected to this book as not being the best evidence that the defendant was a member of

(1) (1852) 3 Car. & K. 75.

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Parliament; that the best evidence was the certificate of the name of the member under the hand of the returning officer indorsed on the writ of election which is in the possession of the Clerk of the Crown in Chancery in accordance with r. 44 in Sched. I. to the Ballot Act, 1872 (35 & 36 Vict. c. 33).

Gore-Browne, K.C., tendered the book as a Journal of the House of Commons and cited *Jones v. Randall* (1); *Rex v. Lord George Gordon* (2); *Lord Melville's Case* (3); *Attorney-General v. Bradlaugh* (4); the Evidence Act, 1845 (8 & 9 Vict. c. 113), s. 3; and the Documentary Evidence Act, 1882 (45 Vict. c. 9), s. 2. He contended that the book was evidence of the facts stated therein and on this point referred to *Rex v. Francklin* (5) and *Rex v. Holt*. (6)

SCRUTTON J. ruled that the return book was not the best evidence. (7)

The witness then produced a book which he said contained an accurate copy of certain division lists. It was the business of certain clerks in the House of Commons to take a record or tally of members voting on divisions in the House. From the records or tallies so taken lists were made up, which were on the morning following the division regularly sent to every member. Any errata in the lists were corrected by the members concerned, and the lists with corrections, if any, were printed in the book produced. The book purported to be printed by the authority of the House of Commons and was kept in the Library of the House.

Duke, K.C., objected that the book was not a public document, but merely a private record from day to day of domestic matters occurring in the House of Commons.

SCRUTTON J. This book purporting to be printed by the authority of the House of Commons recording the divisions and

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| (1) (1774) 1 Cowp. 17. | p. 636. |
| (2) (1781) 2 Doug. 591, 593. | (6) (1793) 5 T. R. 436. |
| (3) (1806) 29 St. Tr. (Howell) at p. 685. | (7) It has been suggested by a member of the Bar that the return book was evidence by virtue of 7 & 8 Will. 3, c. 7, s. 5.—Note by Reporter. |
| (4) (1885) 14 Q. B. D. 667. | |
| (5) (1731) 17 St. Tr. (Howell) at | |

the names of those who voted on them is admissible on the principle on which the Journals of the House are admissible.

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This book shewed that the defendant had voted on many occasions between March and November, 1912.

The Right Honourable Louis Samuel Samuel-Montagu, Baron Swaythling, was then called on subpoena to produce the deed of partnership of the firm of S. Montagu & Co. It appeared that there were as many counterparts of this deed as there were partners in the firm and that each partner had the right to take and use for his own purposes one counterpart or copy duly signed and sealed. The counterparts or copies when not required were kept in the offices of the firm. Each of the other partners, except one who was ill, had been served with a writ of subpoena. Lord Swaythling objected to produce his counterpart on the grounds (1.) that he was advised that it was not in his sole possession or power but was in the joint possession of himself and his co-partners, all of whom were not before the Court, and that he could not produce the document without the permission of his co-partners, who in fact objected to its being produced; and (2.) that if his counterpart was in his sole possession the production of it would be a breach of his confidential relations with his partners.

Duke, K.C., for the defendant. The witness is not bound to produce the counterpart: *Attorney-General v. Wilson* (1); *Hadley v. McDougall* (2); *Crowther v. Appleby* (3); *Kearsley v. Philips*. (4)

Gore-Browne, K.C., for the plaintiff. The protection cannot be claimed in case of a criminal charge where the fact of co-partnership is part of the charge: *Reg. v. Cox* (5); *Williams v. Quebrada Railway, Land and Copper Co.* (6); *Bullivant v. Attorney-General for Victoria* (7); *Rex v. Daye*. (8)

Danckwerts, K.C., in reply. If the entering into the articles of partnership had been part of the crime, the cases cited on behalf of the plaintiff would have been applicable. But that is not the

(1) 9 Sim. 526.

(2) (1872) L. R. 7 Ch. 312.

(3) L. R. 9 C. P. 23.

(4) 10 Q. B. D. 36.

(5) (1884) 14 Q. B. D. 153.

(6) [1895] 2 Ch. 751.

(7) [1901] A. C. 196.

(8) [1908] 2 K. B. 333.

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case. A person is not bound to incriminate himself. The firm may be liable under s. 10 of the House of Commons (Disqualification) Act, 1782.

SCRUTTON J. The plaintiff brings this action against the defendant and claims penalties on the ground that the defendant sat and voted in the House of Commons at a time when he was a partner in a firm having a contract with the Secretary of State for India in Council. With a view of proving that the defendant was a member of the firm of S. Montagu & Co., the plaintiff served on Lord Swaythling a writ of subpoena duces tecum commanding him to produce in Court the partnership deed of S. Montagu & Co. Lord Swaythling objected to produce the deed on two grounds—first that, assuming the deed to be in his possession, the production of it would involve a breach of that confidence which he owes to his partners, and secondly that, as a matter of mixed law and fact, the deed was in the joint possession of himself and his partners. In fact the deed was executed in multiple by each partner. Counsel for the defendant contended that each counterpart is in the possession of all the partners, and that one partner cannot be compelled to produce a document which is in the joint possession of himself and his partners who are not before the Court. If that be the true view I am bound by the authority of *Attorney-General v. Wilson* (1), *Crowther v. Appleby* (2), and *Kearsley v. Philips* (3) to hold that Lord Swaythling cannot be compelled to produce this document.

But in my view this is not the true legal position. I think that each partner has a property in his own copy. These documents are not mere copies of one original. Each copy is executed by all the partners and each is in the possession of that partner for whom it was executed and to whom it was delivered. I am inclined to think that although each copy is the property of each partner, yet his co-partners could restrain any one of the partners from publishing abroad the contents of his copy. Each partner may peruse and take copies of his own deed, but by virtue of the

(1) 9 Sim. 526.

(2) L. R. 9 C. P. 23.

(3) 10 Q. B. D. 36.

agreement between himself and his co-partners he could not empower strangers to do so and publish the contents to the world at large. What then is the position? The case of *Rex v. Daye* (1) throws much light on the subject. It was a criminal case. Of course I read it according to its subject-matter. The French Government required evidence for proceedings in France against one Henri Lemoine who was charged with fraud in regard to an alleged secret process for manufacturing diamonds equal to natural ones, there being in fact no secret process as pretended. As part of the fraud he had deposited with a bank in the name of himself and another a sealed packet which was not to be withdrawn except with the consent of both parties. The bankers were served with a subpoena to which they made answer that the packet had been deposited with them by two depositors and that they had undertaken to keep it and not to produce or deliver it to any person without the consent of both depositors, and that inasmuch as the depositor Lemoine objected to the production and delivery they were advised and believed "that they would be committing a breach of the duty that they had undertaken if they did so produce and deliver the sealed packet." In other words they stated that they had the packet in their possession, but held it for two persons with whom they had agreed not to produce it without their joint consent, and that one of them objected. Two of the learned judges deal with that contention. Lord Alverstone C.J. said (2): "In my judgment it is quite impossible to say that the subpoena can be answered and defeated by the fact that one of the persons who deposited the document with the bank made an arrangement that it should not be delivered up by the bank without the consent of the two parties who deposited it. That is the ordinary way in which documents which belong to two persons, or in which two persons have an interest, are deposited; and where there is a criminal proceeding, and there is a suggestion that the document deposited will be important evidence in the case, I can see no ground whatever for the contention that the fact that the bank, or any other custodian, received it on the terms that it should not be delivered up except by the consent of the two

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(1) [1908] 2 K. B. 333.

(2) [1908] 2 K. B. 333, at p. 338.

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depositors is any answer at all. In my judgment this document deposited with the bank on the terms that they should not give it up ought to be produced to the Court in the ordinary process of law." Darling J. said (1): "It appears to me that a document must be produced to the Court if a subpoena be served upon a person who has it. I cannot see that a subpoena may be disobeyed because the document happens to be enclosed in something, as in an envelope, or even in a bag or box." I agree that these passages must be read by the light of the subject-matter with which the Court was dealing. Mr. Duke contended that they apply only to criminal proceedings and amount to no more than this, that provided the document is relevant evidence of the crime and has not come into existence in the process of advising a client upon his defence after the crime has been committed, the fact that it is in the hands of one person on behalf of another will not relieve the former from the obligation to produce it upon subpoena. I see no difference between a criminal charge and a penal action for this purpose. This partnership deed is as important evidence in this penal action as the sealed packet was in the criminal case of *Rex v. Daye*. (2) The partnership is one of the facts which, if the plaintiff is right, caused the defendant to incur penalties. Therefore the fact being that Lord Swaythling is in possession of the deed executed by all the partners, his objection that he cannot produce it without the consent of all his co-partners is, on the authority of *Rex v. Daye* (2), a bad objection. The deed must therefore be produced.

The deed when produced shewed that Sir Stuart Samuel was a member of the firm of S. Montagu & Co. The witness proved the signature of the defendant to the deed and also to the test roll of the House of Commons. Both these documents were then put in.

The witness was then called upon to produce a number of letters and copies of letters which had passed between the firm and the India Office. These he objected to produce on the grounds (1.) that they were not in his sole possession but in the joint possession of himself and his partners, who were not all

(1) [1908] 2 K. B. at p. 340.

(2) [1908] 2 K. B. 333.

before the Court and who objected to their production ; (2.) that the letters tended to subject him to penalties under s. 10 of the House of Commons (Disqualification) Act, 1782.

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SCRUTTON J. allowed the objection upon the first ground.

A clerk from the office of the Clerk of the Crown in Chancery then produced upon subpœna the writ for the election of members for Tower Hamlets, Whitechapel Division, with a certificate indorsed thereon under the hand of the returning officer to the effect that the defendant had been returned on December 8, 1910.

A shorthand writer who took notes at the inquiry before the Select Committee of the House of Commons as to the vacation of the defendant's seat was called and read from his notes portions of the evidence given by the defendant before the committee relating to his membership of the firm of S. Montagu & Co., his election on December 8, 1910, as a member of the House of Commons, and the state of his knowledge of the transactions between the firm of S. Montagu & Co. and the Secretary of State for India in Council.

Gore-Browne, K.C., then put in an Order in Council made under s. 4 of the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), referring the report of the special committee for hearing or consideration by the Judicial Committee of the Privy Council and the report of the Judicial Committee thereon. (1)

This concluded the plaintiff's case.

On behalf of the defendant a clerk from the office of the defendant's solicitors was called. He proved that on November 8, 1912, two writs had been issued against the defendant for penalties under the House of Commons (Disqualification) Act, 1782, for sitting and voting in the House of Commons on the same days as those specified in the statement of claim in the present action. One of these writs was issued by one Herbert Burnett and the other by one Thomas Chambers. The statement of claim in

(1) See *In re Samuel* [1913] A. C. 514.

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Burnett's action was dated January 15, 1913. In Chambers's action no statement of claim had yet been delivered.

The evidence in the case having been heard,

Duke, K.C., Danckwerts, K.C., McCardie, and E. L. Barnes, for the defendant. The defendant is entitled to judgment.

1. Assuming that he was elected a member of Parliament in December, 1910, and that his firm in 1911 and 1912 were executing a contract with the Secretary of State for India in Council, s. 6 of the Act of 1801, which is the material section, has no application to him. That section imposes penalties on any person "so hereafter elected and returned," and declared to be disabled or to be rendered incapable by this Act to be elected, who shall presume to sit or vote as a member of the House of Commons. The words "so elected and returned" refer to the earlier words of the section "any person hereby declared to be disabled from, or rendered incapable of sitting or voting in the House of Commons" who "shall nevertheless be elected or returned as a member." The section applies only to a person whose disqualification precedes his election, not to the case of a person who only becomes disqualified after election. In administering a penal statute if there are two reasonable constructions the Court adopts the more lenient one: *Tuck & Sons v. Priester*. (1)

2. The words "persons hereby declared to be disabled from or rendered incapable of sitting or voting" in s. 6 of the Act of 1801 refer back to s. 1 of the same Act, which disqualifies from sitting and voting in the House of Commons in any Parliament of the United Kingdom all persons disabled from or incapable of being elected or sitting or voting in the House of Commons of any Parliament of Great Britain. Those persons are specified in s. 1 of the Act of 1782 as persons who undertake, execute, &c., any contract, agreement, &c., made with certain high officials "or with any other person or persons whatsoever, for or on account of the public service." The Secretary of State for India in Council is not "any other person" within the meaning of that enactment. By the Government of India Act, 1858 (21 & 22

Vict. c. 106), ss. 1, 3, 7, 19, 21 and 41, the government of India is now vested in the Crown; the powers formerly vested in the East India Company are exercised by one of the principal Secretaries of State. The Council of India under the direction of the Secretary of State, who is its president, conduct the business transacted in the United Kingdom, including the expenditure of the revenues of India, which cannot be appropriated without the concurrence of a majority of votes at a meeting of the Council. Such an official is not within the purview of the words "any other person whatsoever."

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3. Assuming that penalties are recoverable as upon a breach of the Act of 1801, the penalties by s. 9 of the Act of 1782 (which for this purpose is incorporated into the Act of 1801 by s. 6 of the later Act) are forfeited "to any person who shall sue for the same" in the High Court of Justice. That means the person who shall first sue: *Chalchman v. Wright* (1); *Baines v. Blackbourne* (2); *Combe v. Pitt* (3); *Jackson v. Gisting* (4); *Grosset v. Ogilvie* (5), where the argument for the prosecutor contains this passage (6): "It is a known rule of law that on filing an information the informer has a right to the penalty vested in him." This passage has been inserted in the head-note to the case, and must be taken as the basis of the judgment of the House of Lords. The case of *Girdlestone v. Brighton Aquarium* (7) is the last decision upon this point and it follows the earlier cases.

Gore-Browne, K.C., and *A. Neilson*, for the plaintiff. As to the third point, by the words of the statute the penalty is forfeited "to any person or persons"—not the first person—"who shall sue for the same." The fair meaning of those words is that the first person who recovers judgment is entitled to the penalty. Even if that be not so the words mean the first person who specifies his claim. In *Chalchman v. Wright* (1) non constat that the information in the Exchequer had not proceeded to judgment. In *Hutchinson v. Thomas* (8) an information and judgment

(1) Noy, 118.

(2) (1755) Sayer, 216.

(3) (1763) 3 Burr. 1423; 1 W. Bl.

437.

(4) (1741) 2 Str. 1169.

(5) (1753) 5 Bro. P. C. 527.

(6) 5 Bro. P. C. at p. 533.

(7) 3 Ex. D. 137.

(8) (1676) 2 Lev. 141.

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thereon was pleaded. Similarly in *Jackson v. Gisling*. (1) Why was the judgment pleaded unless it was essential? When the judges in the cases cited speak of "the right of action attaching" in some person other than the plaintiff, attaching by judgment must be meant. The mere issue of a writ attaches nothing. The plaintiff has no right until the offence is proved: *Cuming v. Sibly*. (2) A common informer could never recover damages for detention of the debt, because the debt itself did not accrue until judgment: *Frederick v. Lookup*. (3) As a general rule the pendency of a prior action was not a plea in bar of a subsequent action: *Thrustout d. Park v. Troublesome* (4); *Williamson v. Bissill*. (5) It required some statute to give it that effect, and none has been cited. The case of *Girdlestone v. Brighton Aquarium Co.* (6) went to the Court of Appeal (7) and was affirmed on the ground that the second writ and judgment were covinous, not on the ground that the plaintiff's writ was prior in time.

As to the first point, the words in s. 6 of the Act of 1801 "so hereafter elected and returned" refer back to the earlier words "elected and returned to serve in Parliament for any county," &c., and mean that if any person elected to serve in Parliament "and declared to be disabled," &c., shall presume to sit or vote he shall be liable to the penalties prescribed. The persons "declared to be disabled" are described in s. 1 of the Act as persons "disabled . . . from being elected, or sitting or voting in the House of Commons of any Parliament in Great Britain." By reference to s. 2 of the Act of 1782 those persons include a person "being a member of the House of Commons" who shall "directly or indirectly himself or by any other person . . . for his use or benefit, or on his account, enter into any such contract," &c., i.e., a contract with any person "for or on account of the public service." The meaning attributed by the defendant to the words "so hereafter elected and returned" violates the rules of construction. The earlier part of s. 6 of the Act of 1801 deals with a person fulfilling two conditions, namely,

(1) 2 Str. 1169.

(4) (1738) Andr. 297.

(2) (1769) 4 Burr. 2489.

(5) (1861) 31 L. J. (Ex.) 131.

(3) (1767) 4 Burr. 2018.

(6) 3 Ex. D. 137.

(7) (1879) 4 Ex. D. 107.

(1.) being declared to be disabled from or rendered incapable of voting and (2.) being nevertheless elected or returned as a member. The second part deals with a person who has fulfilled the second condition but not as yet the first, and indicates a person who has been elected or returned. If such a person, being afterwards declared to be disabled or to be rendered incapable to be elected, shall presume to sit and vote he is made liable to the penalties. If the draftsman intended to describe again in the second part of the section the person already described in the first, why did he not in the second part use the words "such person" instead of re-stating the conditions in their reverse order?

As to the second point the Secretary of State for India in Council is clearly included in the phrase "any other person whatsoever" in s. 1 of the Act of 1782.

Cur. adv. vult.

May 28. SCRUTTON J. read the following judgment:—Oswald Vernon Forbes sues Sir Stuart Samuel for 46,500*l.* (reduced in the statement of claim to 17,500*l.*), penalties incurred by sitting and voting in the House of Commons at a time when his firm of S. Montagu & Co. had a contract with the Secretary of State for India in Council, contrary to the provisions of 22 Geo. 3, c. 45. The case took four days to hear, owing to the innumerable objections to evidence and to the plaintiff's claim which the ingenuity of counsel raised. Many of these I decided at the time; the remainder, and the principal questions, remain for judgment.

It appeared by Sir Stuart Samuel's admissions before the committee of the House of Commons that he was from 1910 to November, 1912, a member of the House of Commons; that during that time he was also a partner in the firm of S. Montagu & Co.; that at some period during that time his firm had instructions to buy silver for the Secretary of State for India in Council, and did buy silver, and that while his firm were so acting he sat and voted in the House of Commons.

The days on which he voted, and whether on those days his firm were carrying out such contracts, had to be proved by other evidence. As to the days on which he voted alleged in

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the claim, it was not proved that he voted on March 21 or July 18; the division clerk who was present proved that he voted on March 26 twice; the proof of the remaining days in the statement of claim was given by the production from the House of Commons Library of the official copy of the division lists, which I admitted as a record of the proceedings of the House, similar to the Journals. Votes by the defendant on thirty-three days were therefore proved.

I had next to ascertain whether on those thirty-three days or any of them he "executed, held, or enjoyed" any contract with any other persons whatsoever for or on account of the public service. On this point I was furnished with very scanty materials. The Financial Secretary of the India Office produced on subpoena a number of letters from the firm of S. Montagu & Co. containing statements about the purchase of silver and contracts for its purchase. I had not the letters from the India Office which completed the correspondence. I had no oral evidence about the execution of these contracts or the date when each was completed, and had to extract it, if possible, from the letters with no assistance from the plaintiff. If I have gone wrong in the result it is hardly open to the plaintiff, who has given me very little guidance in the matter, to complain. As a result of a careful perusal of the letters and contracts, the plaintiff has not satisfied me that the defendant's firm were executing any contract with the Secretary of State for India on the following days:—July 17, 18, 25, 26, 29, or October 17, 21, 22, 24, 28, 29, 31, November 1, 4, 5, being in all fifteen days of the thirty-three on which he is proved to have voted. This leaves eighteen days on which the defendant voted when his firm were executing a contract with the Secretary of State for India in Council.

The relevant statutes to the case are as follows: In 1782, there being in existence a Parliament of Great Britain and a Parliament of Ireland, Mr. Burke procured to be passed in the Parliament of Great Britain the House of Commons (Disqualification) Act, 1782 (22 Geo. 3, c. 45). Sect. 1 provides that any person who shall execute, hold, or enjoy any contract with certain named high officials (of whom the Secretary of State for India in Council is not one), or with any other person whatsoever, for or

on account of the public service, shall be incapable of being elected or sitting and voting as a member of the House of Commons during the time he shall execute, hold, or enjoy such contract. Sect. 2 provides that if any person being a member of the House of Commons shall enter into such a contract his election shall be void. Sect. 9 provides that if any person declared incapable to sit or vote in Parliament shall nevertheless be returned as a member, his election is void. So far both the case of a public contractor becoming a member and of a member becoming a public contractor have been provided for: the election of each is void. Sect. 9 continues that if any person disabled and declared incapable by this Act to be elected (which refers us back to s. 1) shall sit or vote as a member he shall forfeit the sum of 500*l.* for every day for which he shall sit or vote in the said House to any person or persons who shall sue for the same in any of His Majesty's Courts at Westminster. This deals both with the case of the public contractor becoming a member and the member becoming a public contractor. Each, while he executes the contract, is incapable of being elected a member.

In 1800 the Act of Union destroyed the Irish Parliament and the Parliament of Great Britain, and created a new Parliament, the Parliament of the United Kingdom. To protect this new body the House of Commons (Disqualification) Act, 1801 (41 Geo. 3, c. 52), was passed. Sect. 1 provided that all persons incapable of being elected or sitting and voting in the House of Commons of any Parliament of Great Britain should be incapable of being elected or sitting and voting in the House of Commons of any Parliament of the United Kingdom. Sect. 6 provided that if such a person should be elected, his election should be void, and continued that if any member declared incapable to be elected (that is, because he had a public contract) shall sit or vote he shall incur such pains, penalties, and forfeitures as are imposed by the Acts for disabling such a person from sitting in the Parliament of Great Britain. This again refers back to the Act of 1782. In the result, therefore, a member voting in the House of Commons of the Parliament of the United Kingdom when he has a public contract of the kind specified is liable to a penalty of 500*l.* a day for each day he votes while he holds the

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contract, recoverable by and for the benefit of the common informer. This is by virtue of the Act of 1801, which refers to the Act of 1782 for the description of the act and the penalty.

On those facts and statutes the plaintiff argued that the defendant was liable to a penalty of 500*l.* a day for each day that he sat and voted after his first contract on March 5, and objected to my eliminating any days on which I should find that he was not in fact executing a public contract. As I understood, the ground of this objection was that, as the defendant's election was declared void as soon as he became interested in the first contract, he was voting when not a member. My attention, however, was not called to any statute under which he was liable to a penalty for voting when not a member if he did not hold a public contract at the time of voting; and in my opinion the statute on which the action is based does not impose such a liability.

Counsel for the defendant argued that he was not liable, as the Secretary of State for India in Council was not "any other person whatsoever" within the meaning of the Act, and a contract in respect of Indian revenues was not "for or on account of the public service." They argued this briefly, as it was the exact point argued before the Committee of the Privy Council to whom the question "whether on the facts reported by the Select Committee of the House of Commons the said Sir Stuart Samuel is disabled from sitting and voting in the House" was referred by His Majesty. (1) A judge of the King's Bench Division is not technically bound by this decision, though of course he will consider it with the greatest respect. As, after independent consideration, I substantially agree with the report and the reasons on which it is founded, I only propose to decide against the defendant's contention on this point, referring for my reasons to the report of the Judicial Committee.

The defendant next objected that if on the evidence he was a member of Parliament from 1910 and voted in 1912, while his firm had a Government contract, he was not thereby exposed to any penalty under s. 6 of the Act of 1801, which only applied to members elected while they had a Government contract. The

(1) See *In re Samuel* [1913] A. C. 514.

first part of this section clearly relates to persons who, being declared incapable of sitting and voting, are yet elected, and "such election" is the election of such a person. The penalty part of the section then proceeds, "and if any person or persons so hereafter elected." The defendant contends that this refers to the class of persons mentioned in the first part of the section, namely, those who, being disabled from sitting and voting, are then elected. The plaintiff contends that "so elected" means "elected to serve in Parliament for any county," &c. He points out that the proper words to express the defendant's contention would be "any such person," not "any person," and that the words which follow, that is, "and declared to be disabled," &c., are quite unnecessary if the defendant is right in contending that "so elected" refers back to the same words in the commencement of the section. The later words "such person so sitting" also support the plaintiff's view; "such person" refers to the person described at the beginning of the penalty clause, "so sitting" to the words "as a member of the said House of Commons." In case of ambiguity, I should be bound to act on the principles for the construction of penal statutes recognized by Lord Esher M.R. and Lindley L.J. in the case of *Tuck v. Priester* (1), and of two reasonable constructions adopt the more lenient view, but I cannot persuade myself that the defendant's contention on this point is reasonably possible, and I am satisfied on the facts I have found that the votes of the defendant expose him in a proper action to the penalties under s. 6 of the Act of 1801.

The defendant then gave evidence that while the plaintiff's writ against him was issued on November 9, 1912, for 46,500*l.* forfeited by sitting and voting in the House of Commons, after he had become incapable of being elected, contrary to the provisions of 22 George 3, c. 45, two other writs had been issued against him on the preceding day, November 8. One was by one Burnett for "46,500*l.* under the statute 22 George 3, c. 45," one by one Chambers for penalties at the rate of 500*l.* a day for breach of 22 George 3, c. 45, in respect of sitting and voting in the House on various dates between March 1 and the issue of

(1) 19 Q. B. D. 629, at pp. 638, 645.

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the writ, being then interested in a Government contract. These claims in the writs were rendered more precise by the respective statements of claim. In the present case the 46,500*l.*, which was obviously in respect of ninety-three votes at 500*l.* each, was reduced to 17,500*l.* in respect of thirty-five named days, the defendant being alleged to be interested in certain contracts for the purchase of silver made on dates from March 5, 1912, to September 11, 1912. Burnett's claim was particularized as for thirty-nine days which include all the plaintiff Forbes's days, except July 18, as to which he fails to give evidence, and in respect of contracts for the purchase of silver substantially identical with those alleged by Forbes. Chambers's claim alleges one silver contract on March 5, 1912, being the first contract alleged by Forbes, and claims that the defendant voted ninety-three times while that contract was in force, obviously referring to the 46,500*l.* (93 multiplied by 500) originally claimed by Forbes and Burnett. Chambers has not yet given particulars of the days on which the voting took place. I am satisfied that the two writs of Burnett and Chambers relate to the same voting and liability to penalties as the present action by Forbes.

On these facts the defendant contends that the authorities bind me to decide that these two prior writs, or one of them, are or is a bar to Forbes recovering in the present action. It is said that the defendant is only liable to one penalty for each day on which he votes when under disability, and that that penalty belongs to the first person who issues his writ for it, who thereby attaches or appropriates it to himself.

The authorities on this point stand as follows:—

In *Chalchman v. Wright* (1), in an information for penalties, the defendant “pleads that there is a former information hanging against him in the Exchequer for the said offence. And adjudged a good bar, if it be bona fide; and if it be not bona fide the plaintiff may avert the fraud.” This appears to decide the exact point. Counsel for the plaintiff could only say (1.) that the prior information may have gone to judgment. The language, however, seems quite inappropriate to a suit not then pending or hanging, but already adjudged. (2.) That as the Crown had half

(1) Noy, 118.

the penalty, it might make a difference, but he was unable to explain, or I to understand, why.

In *Baines v. Blackbourne* (1), to an action of debt for a penalty, the defendant pleaded in abatement that a prior action was depending for the same matter. Upon a demurrer to this plea it was held bad, "And by the Court the pendency of a prior action for the same matter may be pleaded in bar to a second action; but it cannot be pleaded in abatement." This opinion is no doubt obiter dictum as to the plea in bar, but the dictum agrees with the judgment in *Chalchman v. Wright*. (2)

In 1763, in *Combe v. Pitt* (3), to an action for a penalty the defendant pleaded in abatement another writ for the same penalty in the same term; both writs were, as was the practice, attested of the same day, returnable the same day, and both declarations are of the same terms, but subsequent pleadings alleged various proceedings to prove which was in fact first issued. Lord Mansfield said (4) that a plea in abatement was bad, that the proper plea was "that the right of action was attached in some other person before the present plaintiffs' action was commenced." In that case no judgment had been given in the action pleaded in abatement; Lord Mansfield's suggested good plea is an obiter dictum, but agrees with *Chalchman v. Wright* (2) and *Baines v. Blackbourne*. (1) Counsel for the plaintiff pointed out that in the two cases which Lord Mansfield cited both defendants pleaded an information and a judgment. This is true, but in each case priority of information was held not to be alleged, and was held a necessary allegation that the Court might judge of the priority, priority of action being essential and necessary to be ascertained. This certainly shews that priority of judgment is not a defence unless there is also priority of action. Lord Mansfield uses the phrase "that the right of action was attached," meaning obviously that the proceedings were commenced. Mr. Dunning (5) at p. 1427 uses the same phrase, "such a priority of suit on the part of the plaintiff as is necessary to attach the right of action in him," and in the case cited in Hobart's Reports, *Pie v. Coke* (6),

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(1) Sayer, 216.

(2) Noy, 118.

(3) 3 Burr. 1423.

(4) 3 Burr. at p. 1433.

(5) Arguendo for the defendant.

(6) (1617) Hob. 128.

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two informations were exhibited on the same day, "so there was no priority to attach the right of action in the one more than in the other." The phrase seems to be used of the commencement of proceedings, not of a judgment that they are well grounded. There agrees with this the report of *Grosset v. Ogilvie* (1), where the reporter has included in the head-note apparently as approved by the judgment of the House, which is not reported, the statement in the argument of counsel that "it is a known rule in law that on filing an information the informer has a right to the penalty vested in him"—in other words, he secures his position against a later informant.

Lastly, in *Girdlestone v. Brighton Aquarium Co.* (2), where the plaintiff sued for a penalty, the defendant pleaded a subsequent action and recovery, and the plaintiff replied it was collusive, the Court, while holding that the second proceeding was collusive, said obiter that a further objection was open on amendment of the pleadings, namely (3): "The present action was brought on August 17, and the penalty sought to be recovered was in respect of the opening of the Aquarium on August 15. The effect of bringing the action was to make the penalty a debt due to the plaintiff, and no other action could afterwards be maintained in respect of it—*Jackson v. Gisling* (4); *Hutchinson v. Thomas* (5); see also *Combe v. Pitt* (6), though in that case the plea was in abatement. It follows that, upon its appearing that the present action was commenced before Rolfe's action, the proceedings in Rolfe's, though prosecuted to judgment, could have no effect upon the right of the plaintiff. . . . The case of *Chalchman v. Wright* (7) is an authority upon the whole case. It shews that previous proceedings are a bar to subsequent proceedings for the same penalty, and that proceedings to be a bar must be *bona fide*." This, though obiter, agrees with the previous authorities cited. The earlier authorities are summarized in Bacon's Abridgment, Actions Qui Tam D., thus: "Where a suit on a penal statute may be said to be depending, it may be pleaded in bar of a

(1) 5 Bro. P. C. 527.

(4) 2 Str. 1169.

(2) 3 Ex. D. 137.

(5) 2 Lev. 141.

(3) 3 Ex. D. at p. 143.

(6) 3 Burr. 1423; 1 W. Bl.

(7) Noy, 118.

subsequent prosecution, being expressly averred to be for the same offence," and the note states that the pendency is from the purchase of the writ or the date of suing it forth. (1)

If the question were free of authority I should feel great difficulty. On the one hand, it is hard on the first claimant honestly prosecuting his suit that if by the accidents of legal procedure a second claimant should obtain judgment first, the prior claimant should lose his priority. On the other hand, there is some difficulty in seeing how a second claimant can be permanently barred from judgment merely by a prior writ, which may subsequently be honestly discontinued or fail for lack of evidence. But in my view I am relieved from these considerations by the authorities I have cited, which bind me as a judge of first instance to hold that prior writs for the same offences not proved to be collusive bar judgment in the subsequent action.

I have next to consider a curious point raised by the form of the three proceedings. As has been pointed out, the statute of 1782 applied to members of the Parliament of Great Britain; the Act of Union established a new Parliament of the United Kingdom, and thereupon the Act of 1801 applied the previous disabilities and penalties for members of the respective Parliaments of Great Britain and Ireland to members of the Parliament of the United Kingdom. Penalties are therefore recoverable under the statute of 1801 applying the statute of 1782. But all three informants based their claim on the statute of 1782 alone, which does not apply to the Parliament of the United Kingdom. On this objection being taken the plaintiff Forbes applied to amend by alleging the two statutes; that the defendant acted contrary to the form of the statutes, and that the plaintiff was entitled to the penalty. This raised the questions whether amendment was necessary, and if necessary, whether it should be allowed in a penal action having regard to the rights of the other informants. Before the Judicature Act, and now, the Courts must take notice of public statutes though not pleaded. Bacon's Abridgment, Actions Qui Tam B., states the law thus: "It is agreed that an action or information on a public statute need not recite the statute on which it is grounded; whether

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(1) See also 2 Bl. Com. 437.

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the offence be such only because prohibited, or be an evil in its own nature; and whether it be prohibited by more than one statute or by one only; for the judges are bound *ex officio* to take notice of all public statutes. But, if the prosecutor take upon him to recite the statute and materially vary from a substantial part thereof, this is fatal, because it does not judicially appear to the Court that there is such a foundation for the prosecution as that whereon it is expressly grounded." In *Boyce v. Whitaker* (1), where the defendant, doubting whether a statute was private or public, set it out, but incorrectly, Lord Mansfield and Buller J. "held him to half a letter," and decided against him. Commenting on this in *King v. Marsack* (2), Lord Kenyon held that any material difference between the statute recited and the true statute made the declaration and the judgment based thereon bad. If this is so of a misrecital of the correct statute, it would have clearly applied to a claim under the wrong statute, and Comyn's Digest, Action upon Statute (H), contains a number of cases where the plaintiff failed for misrecital. But it is said that since the Judicature Act pleadings need only contain facts and not law, and that the misrecitals and claims under the Act of 1782 are merely surplusage, and the Court is bound to know under what public Act the penalty is really claimed. I am disposed to think that if the informer for a penalty merely stated facts and claimed a penalty, his claim would either be struck out as embarrassing or he would be ordered to state under what statute he claimed; and that if he did allege a claim under the wrong statute his claim would fail at the trial. But I do not think it necessary to decide this, for the plaintiff appears to me to be in this difficulty. Either he is right and the misrecitals and false statutory claims are surplusage, and in that case there are two prior writs to his for the same penalties, which I have held are a legal bar to his recovering, and he fails: or he is wrong, and, reciting a statute as the basis of his claim, he must recite the right one. In that case, as he has recited the wrong one, he fails.

But he then applies for an amendment, the effect of which, if granted, would be to give him priority over the two other

(1) 1 Doug. 94.

(2) 6 T. R. 771.

claimants whose writs are prior to his, who have recited the wrong statute, though one of them is, I was told, also applying to amend. I do not wish to lay down that no amendment should ever be allowed in a claim under a penal statute. In *Ex parte Swift* (1) the Court said to a claimant for penalties applying to amend his declaration that, "not considering his action to be brought in the spirit of the Act, although it might be within its letter, they would not exercise their discretion in his favour." But if I have a discretion to amend, as I think I have, I do not think, where three informers are racing for penalties quite excessive as a reward for their public merits, I should amend one informer's declaration so as to give him priority over others at present in priority to him. In my view each informer must stand on the merits and priority of his own pleadings, without assistance to improve them from the discretion of the Court. I therefore refuse leave to make the proposed amendment.

In the result I give judgment for the defendant with costs, on the grounds, first, that the plaintiff's claim is barred by a previous writ for the same penalties which has, as Lord Mansfield said, attached the right of action; secondly, that if it is material that, if any statute is recited as a foundation of the action, the proper statute should be recited, the plaintiff has proceeded on the wrong statute, and that in view of the competing actions of rival informers and their priorities I decline to allow him to amend by alleging the right statute, if such allegation be necessary.

As, however, considerable portions of the four days which the case occupied were taken up by objections on which the defendant failed, I direct the taxing Master only to give the costs appropriate to an action lasting two days. This direction on balance will, in my view, do justice between the parties.

Judgment for defendant.

Solicitors for plaintiff: *Percy Bono & Co.*

Solicitors for defendant: *Gilbert Samuel & Co.*

NOTE 1.—21 Jac. 1, c. 4, s. 1: "Whereas the offences against divers and sundry penal laws and statutes of this realm may better, and with more ease

(1) 3 Dowl. 636.

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and less charge to the subject, be commenced, sued, informed against, prosecuted, and tried in the counties where such offences shall be committed; and whereas the poor Commons of this realm are grievously charged, troubled, vexed, molested, and disturbed by divers troublesome persons, commonly called relators, informers, and promoters, by prosecuting and enforcing them to appear in His Majesty's Courts at Westminster, and to answer offences supposed by them to be committed against the said penal laws and statutes, or else to compound with them for the same; For remedy whereof be it enacted by the authority of this present Parliament, that all offences hereafter to be committed against any penal statute, for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information, before justices of assize, justices of nisi prius or gaol delivery, justices of oyer and terminer, or justices of the peace in their general or quarter sessions, shall after the end of this present session of Parliament be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment before the justices of assize, justices of nisi prius, justices of oyer and terminer, and justices of gaol delivery, or before the justices of the peace of every county city borough or town corporate and liberty, having power to inquire of, hear, and determine the same within this realm of England or dominion of Wales, wherein such offences shall be committed in any of the Courts, places of judicature, or liberties aforesaid respectively only at the choice of the parties which shall or will commence suit or prosecute for the same, and not elsewhere, save only in the said counties or places usual for those counties, or any of them . . . and that all and all manner of informations, actions, bills, plaints, and suits whatsoever, hereafter to be commenced, sued, prosecuted, or awarded, either by the Attorney-General of His Majesty, his heirs or successors for the time being, or by any officer or officers whatsoever for the time being, or by any common informer or other person whatsoever, in any of His Majesty's Courts at Westminster, for or concerning any [of] the offences, penalties, or forfeitures aforesaid, shall be void and of none effect; any law custom or usage to the contrary thereof notwithstanding."

By s. 2, in all informations, and in all bills, counts, plaints, and declarations in any action or suit, for or concerning any offence against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed, and not elsewhere; and if the plaintiff or informer shall not prove that the offence was committed in that county, the defendant shall be found not guilty.

Sect. 3: "No officer or minister in any Court of record shall receive, file, or enter of record any information, bill, or plaint, count or declaration, grounded upon the said penal statutes or any of them which before by this Act are appointed to be heard and determined in their proper counties until the informer or relator hath first taken a corporal oath before some of the judges of that Court that the offence or offences laid in such information, action, suit, or plaint was or were not committed in any other county than where by the said information, bill, plaint, count, or declaration the same is or are supposed to have been committed, and that he believeth in his conscience the offence was committed within a year before the information

or suit within the same county where the said information or suit was commenced; the same oath to be there entered of record."

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Sect. 4: "If any information suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the King, or by any other, or on the behalf of the King and any other, it shall be lawful for such defendants to plead the general issue that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same; which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the information suit or action, and the said matters shall be then as available to him or them to all intents and purposes as if he or they had sufficiently pleaded set forth or alleged the same matter in bar or discharge of such information suit or action."

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House of Commons (Disqualification) Act, 1782 (22 Geo. 3, c. 45), s. 1: "Any person who shall, directly or indirectly, himself, or by any person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract, agreement, or commission, made or entered into with, under, or from the Commissioners of His Majesty's Treasury, or of the Navy or Victualling Office, or with the Master General or Board of Ordnance, or with any one or more of such Commissioners, or with any other person or persons whatsoever, for or on account of the public service . . . shall be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time that he shall execute, hold, or enjoy, any such contract, agreement, or commission, or any part or share thereof, or any benefit or emolument arising from the same."

Sect. 2: "If any person being a member of the House of Commons, shall directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, enter into, accept of, agree for, undertake, or execute, in the whole or in part, any such contract, agreement, or commission, as aforesaid; or if any person, being a member of the House of Commons, and having already entered into any such contract, agreement, or commission, or part or share of any such contract, agreement, or commission, by himself, or by any other person whatsoever in trust for him, or for his use or benefit, or upon his account, shall, after the commencement of the next session of Parliament, continue to hold, execute, or enjoy the same, or any part thereof, the seat of every such person in the House of Commons shall be, and is hereby declared to be void."

Sect. 9: "If any person hereby disabled, or declared to be incapable to sit or vote in Parliament, shall nevertheless be returned as a member to serve for any county, stewartry, city, borough, town, cinque port, or place, in Parliament, such election and return are hereby enacted and declared to be void: and if any person, disabled and declared incapable by this Act to be elected, shall, . . . presume to sit or vote as a member of the House of Commons, such person so sitting or voting shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said House, to any person or persons who shall sue for the same in any of His

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Majesty's Courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said Courts, by any action of debt, bill, plaint or information"

House of Commons (Disqualification) Act, 1801 (41 Geo. 3, c. 52), s. 1: "All persons disabled from or incapable of being elected, or sitting and voting in the House of Commons of any Parliament of Great Britain, shall be disabled from and be incapable of being elected, or sitting and voting in the House of Commons of any Parliament of the United Kingdom, as knights, citizens, or burgesses, for any county, stewardry, city, borough, cinque port, town, or place, in that part of the United Kingdom called Great Britain."

Sect. 6: "If any person hereby declared to be disabled from, or rendered incapable of sitting or voting in the House of Commons, shall nevertheless be elected or returned as a member to serve in Parliament for any county, stewardry, city, borough, cinque port, town, or place, in any part of the said United Kingdom, such election or return are hereby enacted and declared to be void to all intents and purposes whatsoever; and if any person or persons so hereafter elected or returned, and declared to be disabled or to be rendered incapable by this Act to be elected, shall presume to sit or vote as a member of the said House of Commons, such person or persons so sitting or voting shall incur such pains, penalties, and forfeitures, as are inflicted or imposed by the several Acts of Parliament, heretofore passed in Great Britain or Ireland for disabling or incapacitating such persons from sitting in the Parliaments of Great Britain or Ireland respectively;"

NOTE 2.—The case of *Burnett v. Samuel* was heard before Scrutton J. on June 4, 1913. Application was made on behalf of the plaintiff for leave to amend the writ and statement of claim by suing under the House of Commons (Disqualification) Act, 1801. This application was refused and judgment was given for the defendant.—REPORTER.

W. H. G.

[IN THE COURT OF APPEAL.]

WIMBLE, SONS & CO. v. ROSENBERG & SONS.

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June 26, 27;
July 30.

Sale of Goods—"Free on board"—Goods sent by Seller to Buyer by Sea—
Notice by Seller of Shipment—Risk during Voyage—Sale of Goods Act,
1893 (56 & 57 Vict. c. 71), s. 32, sub-s. 3.

By sub-s. 3 of s. 32 of the Sale of Goods Act, 1893, "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit":—

Held by Vaughan Williams and Buckley L.J.J. (Hamilton L.J. dissenting), that sub-s. 3 applies to a contract for the sale of goods f.o.b.

The plaintiffs sold to the defendants goods "f.o.b. Antwerp to be shipped as required by buyers, cash against bills of lading." Subsequently, on August 9, the defendants sent instructions to the plaintiffs to ship the goods to Odessa and to pay freight on their account, leaving it to the plaintiffs to select the ship. The goods were shipped at Antwerp on August 24, on a steamer which sailed on the 25th and became, with the goods, a total loss on the 26th. The defendants received no information as to the shipment until the 29th, when the bills of lading were presented for payment. The defendants had not insured, and they refused to pay for the goods upon the ground that the plaintiffs had not given them such notice as was required by sub-s. 3:—

Held by Buckley L.J. (Vaughan Williams L.J. dissenting), that before the goods were shipped the defendants had all information necessary to enable them to insure, and that, therefore, there was no obligation upon the plaintiffs, under sub-s. 3, to give notice to the defendants of the shipment on a particular ship.

Decision of Bailhache J. ([1913] 1 K. B. 279) accordingly affirmed.

APPEAL from the judgment of Bailhache J.

By a contract dated June 27, 1912, the plaintiffs, as brokers for De Winter, a foreign principal at Antwerp, sold to the defendants 200 bags of rice "f.o.b. Antwerp to be shipped as required by buyers, cash against bills of lading." It was agreed between the parties that the plaintiffs should be treated as being the actual sellers. On August 9 the defendants sent the plaintiffs instructions to ship the rice to Odessa and to pay freight on their account, leaving it to the plaintiffs to select the ship. The

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printed form of shipping instructions which the defendants ordinarily used contained a request to be informed by the sellers of the name of the ship by which it was proposed to ship the goods and of the date of proposed shipment, but they happened to have temporarily exhausted their supply of those forms and sent their instructions in writing, omitting the customary request above mentioned. The plaintiffs accordingly on the same date sent instructions to De Winter to ship the rice per first steamer to Odessa on account of the defendants and to pay the freight. The rice was shipped on board the steamship *Egyptian* on Saturday, August 24. The ship sailed on Sunday, August 25, and early on the following morning she stranded and became a total loss. The defendants did not receive from the plaintiffs any information of the shipment on the *Egyptian* until August 29, when the plaintiffs presented the bills of lading for payment. The defendants had not insured the rice as it was their practice not to insure until after the receipt of notice of the particular ship on which the goods were loaded. They accordingly refused to pay the price on the ground that the plaintiffs had failed to comply with the provisions of s. 32, sub-s. 3, of the Sale of Goods Act, 1893 (1), and that the rice was consequently at the time of the loss at the plaintiffs' risk. The action was brought to recover the price of the rice and the amount of the freight paid by the plaintiffs on the defendants' account.

(1) 56 & 57 Vict. c. 71, s. 32 :

"(1.) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

"(2.) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the

seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

"(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."

The action was tried before Bailhache J. without a jury, and the learned judge held that sub-s. 3 of s. 32 does not apply to a contract for the sale of goods f.o.b. (1)

The defendants appealed.

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George Wallace, K.C., and *Chaytor*, for the defendants. It is conceded by the plaintiffs that s. 32, sub-s. 3, of the Sale of Goods Act, 1893, cannot apply to a contract of sale "c.i.f." or "ex ship," and, therefore, the only remaining kind of contract to which it can apply is an "f.o.b." contract of some kind. It may be that the sub-section would not apply to an "f.o.b." contract where the buyer named the ship in which the goods were to be sent; but that is not this case, for here the goods were put on board a general ship selected by the seller, and in that respect the contract was not a typical "f.o.b." contract. There was here a contractual duty on the seller to accept the buyer's shipping instructions, which involved the seller taking upon himself the burden of finding a ship to carry the goods, and it thereupon became the duty of the seller to give the buyer such notice, either by naming the ship or otherwise, as would enable the buyer to insure the goods. It is immaterial that the buyer might, apart from notice, have had other opportunities of insuring, or that if the notice had been sent it might not have been in time for an insurance to be effected. Sect. 32, sub-s. 3, adopted the law as it had existed for many years previously in Scotland: see *Arnot v. Stewart*, (2); *Fleet v. Morrison* (3); *Hastie v. Campbell*. (4)

Leck, K.C., and *T. Mathew*, for the plaintiffs. In the case of an "f.o.b." contract goods are not sent by the seller to the buyer by a route involving sea transit within the meaning of sub-s. 3 of s. 32. That sub-section is wholly inapplicable to an "f.o.b." contract such as this one, under which the seller has done all that he is bound to do when he has put the goods on a ship, at which moment as between the buyer and the seller the transit of the goods is ended. The contract of sale was completed as soon as the buyer told the seller to put the goods on a ship for Odessa,

(1) [1913] 1 K. B. 279.

(3) (1854) 16 D. 1122.

(2) (1817) 5 Dow, App. Cas. 274.

(4) (1857) 19 D. 557.

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which was equivalent to telling him to put them on a named ship. The shipping instructions formed no part of the seller's contract, and anything done by him in pursuance of those instructions was done by him not as seller but as agent for the buyer. It is not correct to say that the only contract to which s. 32, sub-s. 3, can apply is an "f.o.b." contract. It would apply to a contract for the sale of goods by a foreign manufacturer to an English trader, the goods to be sent from abroad by the seller to the buyer in England, in which case, delivery to the carrier being delivery to the buyer, the goods while en route would be at the buyer's risk.

Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler (1) affords an example of that class of contract. Assuming that sub-s. 3 does apply to this case, if the buyer has all the necessary information for effecting an insurance, and Bailhache J. found as a fact that that was the case here, the seller is relieved from the obligation of giving the notice required by sub-s. 3. Lastly, the contract itself contained all the notice that the seller could be called upon to give.

George Wallace, K.C., in reply. Sub-s. 1 of s. 32 clearly applies to an f.o.b. contract, and, therefore, sub-s. 3 must also apply. Under such a contract the seller is authorized or required to send the goods to the buyer: *Stock v. Inglis*. (2) [He referred to *Hoog v. Kennedy*. (3)]

Cur. adv. vult.

July 30. (4) VAUGHAN WILLIAMS L.J. This is an appeal from the judgment of Bailhache J. sitting without a jury. The case in substance turns on the construction of s. 32 of the Sale of Goods Act, 1893, and in particular of sub-s. 3 of that section. It is to be remembered, I think, throughout the interpretation of this Act that it is a codifying Act and subject, therefore, to the provisions of the Interpretation Act, 1889, and subject also to the canon of construction when dealing with a codifying Act laid down by Lord Herschell, in the House of Lords, in *Bank of England v. Vagliano* (5), a case on the Bills of Exchange Act, 1882, which was

(1) [1898] A. C. 200.

(3) (1754) 1 Bell's Illustr. 110.

(2) (1884) 12 Q. B. D. 564, 573.

(4) The judgments were written.

(5) [1891] A. C. 107, 144.

also a codifying Act : "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

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Bailhache J. says (1) : "The facts of the case are extremely simple and very little in dispute. They are these. By contract evidenced by a bought note dated June 27, 1912, Messrs. Rosenberg & Sons, the defendants, bought 200 bags of rice. The rice was to be shipped, as regards the buyers, within three months. It was bought f.o.b. Antwerp, and by the contract of sale cash was to be paid against bills of lading accepted in London.

"The plaintiffs in this case are brokers, Messrs. Wimble, Sons & Co., but the contract, it is conceded on both sides, is in such a form as entitles Messrs. Wimble, Sons & Co. to sue upon it in their own names, they have all the rights of vendors and they must fulfil all the duties which fall to be performed by the vendors in respect of this contract, and I may treat them in this case as being the actual vendors. There was a little delay in shipping this rice or sending this rice forward, and the defendants in this case inquired, I think more than once, but certainly inquired once, as to when the rice was coming forward. It did not come forward until August, and on August 9 the defendants sent, as was their custom, shipping instructions to the vendors. The vendors' instructions are in these terms: I will not refer to the terms except to say that they were instructions to ship these 200 bags of rice, but they were not on the usual form on which Messrs. Rosenberg generally sent forward their instructions. The usual form was partly printed and contained in print a request that the vendors should inform Messrs. Rosenberg of the name of the ship by which the rice was about to be shipped. These particular instructions had not that print upon them. The book was for the moment exhausted and instructions were written out upon a slip of paper. It was the practice between these parties that, when these instructions were given,

(1) The Lord Justice read from a shorthand note.

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the vendors, as and when they could, secured shipping room for the rice which was to go forward, and sometimes at the request of Messrs. Rosenberg & Sons they paid the freight. In this particular instance they were requested to pay and did pay the freight. The rice was actually shipped on board a steamer called the *Egyptian* and it was shipped on August 24, 1912. The *Egyptian* sailed from Antwerp on the 25th, which was a Sunday. On the early morning of the 26th she stranded and the rice became a total loss. At 3.45 on the afternoon of the 26th the loss was posted at Lloyd's. The defendants did not at this time know that their rice had been shipped by the *Egyptian* or by boat at all. They knew nothing at all about it until the 29th, when an invoice and bill of lading reached them, and they were requested to pay against documents in accordance with the terms of the contract. They immediately on receipt of the bill of lading attempted to insure this parcel of rice, but of course, inasmuch as notice of the loss had been posted at Lloyd's some three days, their attempts to insure were ineffective. They thereupon declined to take up the shipping documents and to pay for the rice. The defendants insure any parcels that they may have sent by sea on their account in a somewhat peculiar way. They have not an open cover, nor do they insure on giving shipping instructions, but apparently they wait for the actual name of the steamer, and then give their instructions. In many cases it has been proved before me that they have had the name of the steamer before the ship sailed and before their goods were put on board. I am quite satisfied that where they got the name of the steamer before the goods were put on board, they forthwith insured the goods which were to go by that particular steamer. In this instance they had no such opportunity. The name was not given to them before the 29th, and by the 29th it was too late to insure."

As is stated by Bailhache J., Messrs. Wimble, the plaintiffs, were the brokers, but it was agreed that they might sue as if they were the sellers. The defence consists of two parts, in one of which the defendants set up the negligence of the plaintiffs as their agents—that has been abandoned; the other relies upon sub-s. 3 of s. 32 of the Sale of Goods Act, and in effect says that

by reason of the notice enabling the defendants as buyers to insure not having been given, the sea transmission was at the risk of the sellers.

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An argument before us was on the basis that sub-s. 3 of s. 32 had and could have no application to a contract of sale f.o.b. It was argued also that the buyers did not require a notice, because they might have insured these goods by "a general cover contract" or by a "ship or ships" contract, and the Scottish authority of *Fleet v. Morrison* (1) was disposed of on the ground that, although it is mentioned in the argument, the judges of the Scottish Court had not the question of insurance by "cover" or "ship or ships" policies present to their minds, and it is agreed by counsel on both sides that there is no Scottish decision on the point dealing with the case of a contract f.o.b. At the conclusion of Mr. Leck's argument on behalf of the plaintiffs, Mr. Theobald Mathew, his junior, put forward a new point, that notice already had been given, enabling the buyers to insure, for that the contract of purchase itself was notice.

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I will now read sub-ss. 1, 2, and 3 of s. 32 of the Sale of Goods Act. [The Lord Justice read the whole section.] I think it is agreed that sub-s. 3, and indeed the whole of s. 32, includes agreements (if any) outside the contract, and includes also the proof of "the circumstances in which it is usual to insure," and I think includes cases where it has been usual inter partes to insure although the agreement of sale itself contains no reference to insurance: see *Fleet v. Morrison*. (2)

This case turns to my mind on construction. No facts are in dispute. I am of opinion that sub-s. 3 of s. 32 of the Sale of Goods Act covers an f.o.b. contract. To say generally that sub-s. 3 does not cover an f.o.b. contract seems to me to be a conspicuous illustration of departure from Lord Herschell's canon of construction which I have already quoted. The natural meaning of the words of sub-s. 3 does not exclude an f.o.b. contract. The real ground for the suggested exclusion is that the sub-section, construed according to its natural meaning, is hard to reconcile with some of the previous law laid down in the cases relating to the carriage of goods under an f.o.b.

(1) 16 D. 1122. (2) Ibid. at p. 1124.

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contract, and that it is highly improbable that the Legislature intended to alter or modify law which is the result of a series of decisions laid down by great commercial lawyers.

Mr. Leck, in his excellent argument on behalf of the plaintiffs, to my mind was evidently pressed by a strong desire to avoid a breach of Lord Herschell's canon of construction of codifying statutes and argued that sub-s. 3, read in the light of sub-s. 1, has no application to a case where, in pursuance of a contract of sale, the seller is "authorized or required" to send goods to the buyer, and says that under an f.o.b. contract the seller is never authorized nor required to send the goods to the buyer, but completely performs his duty when he puts the goods on board the steamer. Bailhache J. based his judgment on this contention of Mr. Leck and, as I understand his judgment, in effect held that an f.o.b. contract is excluded unless it includes some words whereby the vendor undertook to send the goods by some ship selected by himself, and that in this case the shipping instructions ought not to be regarded as part of the contract, in which case Bailhache J. thought sub-s. 3 would have applied.

I construe the word "send," both in sub-s. 1 and in sub-s. 3, in the sense of "forward" or "despatch," and in my opinion the word "send" covers every obligation of the seller in reference to effecting or securing the arrival of the goods the subject of sale at the destination intended. It is not true in fact to say that the purchased goods are being sent to the ship on which they are placed for the purpose of delivery at the port of destination. The purchased goods are not the less being sent to the buyer at the port of destination because delivery f.o.b. is *prima facie* delivery to the buyer, or because the property has passed to the buyer. Sub-s. 3, in my opinion, casts a duty on the seller forwarding the goods to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, to give such notice as may enable the buyer (to whom be it observed the property in the purchased goods has passed), to insure them during their sea transit. The penalty for not performing this duty is that goods, though the goods of the buyer, shall be at the risk of the seller during such sea transit. Moreover the same result is arrived at if the words "where goods

are sent by the seller to the buyer," at the beginning of sub-s. 3, are construed as describing the whole transaction.

I have already said that I cannot agree with the argument of Mr. Theobald Mathew that the contract of sale itself was notice within the meaning of sub-s. 3, and I have arrived at this conclusion not only on the ground that the contract did not afford sufficient information to enable the buyer to insure the purchased goods during their sea transit, but also on the ground that knowledge of the buyer, actual, inferred, or assumed, which would enable the buyer to insure, does not dispense with the statutory obligation of the seller, where the route involves sea transit under circumstances in which it is usual to insure, to give such notice to the buyer as may enable him to insure the goods during their sea transit. The obligation, unless dispensed with by the agreement,—and in this case there was no dispensing agreement—on the seller is to give such notice, with such details, to the buyer as may be necessary to effect insurance of the goods during sea transit. It is to my mind impossible to construe the words as meaning that the obligation to insure does not arise in case the buyer happens to have sufficient information from some other source than the statutory notice to enable him to insure the goods.

I have only to add that, whichever of the suggested constructions relieving the seller from obligation to give the statutory notice in the case of an f.o.b. contract is adopted, the practical utility and application of sub-s. 3 of s. 32 are reduced to nil.

I think this appeal should be allowed and judgment given for the defendants.

BUCKLEY L.J. Before Bailhache J. counsel for the seller contended that under an f.o.b. contract the seller is never "authorized or required to send the goods to the buyer," a contention which the learned judge seems to have adopted, adding "more particularly as I cannot bring myself to believe that sub-s. 3 applies to an ordinary f.o.b. contract of sale." This contention has been repeated before us. I propose in the first instance to consider it.

The contention is that sub-s. 3 is a qualification of sub-s. 1

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and may be read as if it were prefaced by the words "provided always that." To this I agree. Then it is said sub-s. 1 applies only where the seller is authorized or required to send the goods to the buyer, and that is not the case where the contract of sale is f.o.b., inasmuch as the delivery is complete so soon as the goods are handed over the ship's rail: that the sending by the seller to the buyer is then complete. In my opinion this is erroneous. The sending of the goods is not, within the language of the section, equivalent to the delivery of the goods to the buyer. The first sub-section uses the word "send" and the word "transmission" and the word "delivery." The word "send" is so used as to bear the same meaning as that for which the word "transmission" is next employed, and both the one and the other are contrasted with "delivery," the word last used. In sub-s. 1 the word "send" means, I think, "despatch" or "transmit," in a physical sense, and not "deliver" so as to pass the property at law. The same meaning is, I think, to be attributed to the word "sent" in sub-s. 3. After the property has passed by placing the goods on shipboard under an f.o.b. contract, the goods may, I think, within the meaning of sub-s. 3, be "sent," that is to say, transmitted or despatched by the seller to the buyer. Goods are capable of being sent by the vendor, in whom the property is not, to the buyer, in whom it is.

Next I wish to deal with the words "unless otherwise agreed." The operative words which follow that expression are "the seller must give such notice," &c. The agreement must, therefore, be an agreement agreeing "otherwise" in respect of the giving such notice as is mentioned. An f.o.b. contract is one under which the seller is to put the goods on board at his own expense on account of the buyer, but it is a contract in which, neither expressly nor by implication, is there involved any agreement as to notice to be given by the former to the latter. Whether notice ought to be given or not depends, not upon anything expressed in or implied from the contract as an f.o.b. contract, but might arise aliunde, say, from the course of business between the parties. Neither from the use of the word "sent" nor from the words "unless otherwise agreed," therefore, can I see that there is anything to render sub-s. 3 inapplicable to an f.o.b.

contract of sale. On the contrary, it seems to me that the effect of sub-s. 1 is to add to every contract *prima facie* as an incident that which is involved in an f.o.b. contract, namely, that delivery to a carrier is delivery to the buyer.

The effect of the section seems to me to be as follows: Where in pursuance of a contract of sale goods are to be sent, it shall be an incident of every contract, as it already is of an f.o.b. contract, that delivery to a carrier is delivery to the buyer, with the result that the goods at sea will be at the risk of the buyer. But nevertheless (unless otherwise agreed), if the seller fails to comply with sub-s. 3, the risk shall be that not of the buyer but of the seller. From these provisions I can find no exception of an f.o.b. contract, but on the contrary I find a reduction of every contract for this purpose to the position of an f.o.b. contract.

So far, therefore, it seems to me that the appellants are right and that it is necessary to see whether in the present case sub-s. 3 has been complied with.

Sub-s. 3 requires the seller to give such notice to the buyer as will enable the latter to insure. These words will be satisfied if either (a) the buyer is already in possession of knowledge of all the facts which it is necessary to know in order that he may insure the goods, in which case nothing is wanting to enable him to insure them, or (b) if such notice (if any) as has been given him completes his knowledge of the facts so as to enable him to insure.

The contract of June 27, 1912, was a contract for sale of 200 double bags of rice f.o.b. Antwerp to be shipped as required by the buyer within three months. From this document the buyer knew the particulars of the goods and the port of loading but not the port of discharge. It was for him to name the port to which he wished the goods to be shipped. The shipping instructions of August 9 named the port, namely, Odessa, and also contained further matter in the nature of a request to the sellers with which they were not bound to, but as matter of courtesy in business no doubt would, comply. This request in fact left it to the sellers to select the ship and asked them to pay the freight on the buyer's account. In naming the port to which the goods were to be shipped the buyer was not completing a term of the contract

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of June 27 which was left to his determination. To that extent the shipping instructions formed part of and put the sellers in a position to complete the contract. Further, the shipping instructions, in leaving it as impliedly they did to the sellers to select the ship, were a further completion by the action of the buyer of the terms of the contract. All was now complete: port of discharge: and ship, namely, as regards the ship which the sellers selected sailing to Odessa. The further request that the seller should pay freight formed no part of the contract and was a matter with which the seller was not bound to comply. The conjoint effect of the documents of June and August was this, that in August the buyer had a complete knowledge of the particulars of the goods, the port of shipment, and the port of discharge, and he had waived any right to know the name of the ship by leaving it to the seller to select one.

In this state of facts it was contended that the buyer could have protected himself by a general covering policy. For this purpose a knowledge of all the facts which I have been detailing would be unnecessary, In my judgment this would not constitute a good answer to the buyer's contention. To say that he could cover himself by a general policy is equivalent to saying that in every case, without the knowledge of the particulars, he is already in possession of all the information which enables him to insure. The result is that the sub-section is reduced to silence. This argument, I think, proves too much. But in the facts which I have stated it seems to me that no notice to "enable" the buyer was wanted, for he already had ability: he had all materials necessary to enable him to insure. Those words of the section, therefore, which require the seller to give notice do not apply, for no notice was wanted to enable the buyer to insure. But if this is not so and the seller was under an obligation to give him such notice, &c., then I think he had done so. The contract itself of June 27, 1912, was a sufficient notice. It gave the buyer knowledge of all the necessary particulars other than knowledge which rested with himself, or was determinate by himself, namely, first, the port of discharge, and, secondly, the name of the ship. The former lay within his own knowledge and was supplied by him in August. The latter was not necessary to enable him to insure, and in fact

he waived knowledge of it by leaving it to the seller to select the ship. For these reasons I am of opinion that, although sub-s. 3 is applicable to this case notwithstanding that the contract was an f.o.b. contract, yet the seller has not failed to do anything which by sub-s. 3 he was bound to do. Therefore I think that the appeal fails and must be dismissed.

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HAMILTON L.J. The question in this case is whether the contract is or is not within s. 32, sub-s. 3, of the Sale of Goods Act.

The action is brought for the price of goods sold and delivered. The plaintiffs were not the sellers, who were foreign millers, but were the brokers between the parties. In the events which happened they conceived themselves liable to pay the sellers and have done so, and the case here and below has proceeded on the footing that, as regards the contract in dispute, they have the rights and are subject to the liabilities of the sellers. This is worth noting, because for this reason the case is unaffected by any prior course of business between the defendants and the actual sellers. What was done in regard to contracts, which the plaintiffs did not put in suit, would now be material only to reasonableness in performing this contract, but there is no such question. Further, there was no contention and no finding below as to general custom or particular practice, such as would add any implied term to the present contract. Hence the case as between the present parties rests barely on the written contract of sale itself. As the goods clearly were sold and delivered, subject to the question which is raised by the alleged failure to give notice, as provided by sub-s. 3 of s. 32 of the Sale of Goods Act, the burden of proof is on the defendants. They further alleged against the plaintiffs in the alternative that the latter were not sellers to but agents of the defendants, and that they were negligent in the performance of their duty to their principals. These defences were mutually exclusive. If the plaintiffs were not sellers to but agents of the defendants, s. 32 of the Sale of Goods Act had nothing to do with them. In my opinion this was the real defence, if there was one, but Bailhache J. decided against this alternative contention, not, be it said, on the ground that the plaintiffs were not in fact agents

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or not in law open to any defence arising out of a contract of employment, but solely on the ground that no damage resulted from any breach of such contract. No point has been made before us that the decision should have been for the defendants for nominal damages on a counter-claim, if they chose to amend. In fact the learned judge's decision on this part of the case is not appealed against. Bailhache J. decided that s. 32, sub-s. 3, of the Sale of Goods Act did not apply to this case. This is the subject of the appeal. The question is whether he was right. I think he was.

(1.) The "sending" of the goods in sub-ss. 1 and 3 of s. 32 is the same thing in each case, an actual forwarding or transmission. The use of the same word "send" in s. 29 shews this. But in sub-s. 1 the case is, "where the seller is authorised or required to send the goods" and that too "in pursuance of a contract of sale"; in sub-s. 3 the case is, "where the goods are sent by the seller to the buyer" simply. In the former, which is a provision in favour of the seller limiting his responsibility, the questions are, Was he authorized or required to send the goods, that is, to transmit or forward them, to start them on their journey? Has he done so? When and where does his responsibility cease? A further question was raised, which we need not decide, namely, does "in pursuance of a contract of sale" mean "in performance of" or "as required under the terms of"? On the other hand the latter sub-s. 3 is one in favour of the buyer and makes his responsibility in certain circumstances conditional on the seller's giving a certain notice. Here the question is not merely have the goods been "sent" in the above sense, but have they been so sent by the seller to the buyer, that is, by the sender as seller to the receiver as buyer, or, in the language of sub-s. 1, sent "in pursuance of a contract of sale." Hence, in spite of the use of the same verb "to send," it does not necessarily follow that a contract involving sending, if within sub-s. 1, must therefore also be within sub-s. 3. It is well settled that, on an ordinary f.o.b. contract, when "free on board" does not merely condition the constituent elements in the price but expresses the seller's obligations additional to the bare bargain of purchase and sale, the seller does not "in pursuance of the contract of sale" or as

seller send forward or start the goods to the buyer at all except in the sense that he puts the goods safely on board, pays the charge of doing so, and, for the buyer's protection but not under a mandate to send, gives up possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There his contractual liability as seller ceases, and delivery to the buyer is complete as far as he is concerned. In such a case the goods are not "sent by the seller to the buyer," though they then begin a journey which will end in the buyer's hands. In law, as between buyer and seller, they are then and there delivered by the seller to the buyer, and thereafter it is by the buyer and his agent, the carrier, and not by the seller, that the goods are "sent" to their destination. It is in this sense that I understand the words of Bailhache J., "what one generally understands by an f.o.b. contract is that the goods are not sent by sea by the vendor but are delivered by him at the rail of the ship and are then taken over by the shipowner nominated by the buyer and conveyed by him across the sea." So understood, I agree with them.

(2.) The sub-section obliges the seller, "under circumstances in which it is usual to insure," to give a notice, and that notice such "as may enable the buyer to insure the goods." The sub-section does not say how or by whom it is usual to insure, or that the buyer is to be enabled to insure at any particular time or in any particular way. Nor, again, does it say such notice as would be reasonably sufficient to enable him to insure, but such as may enable, that is, in fact and under the circumstances actually enable, him to insure. If the seller fails to fulfil this obligation, then, in addition to or in substitution for (I know not which) any provable damages for the breach, he loses both the goods and the price in case the goods are lost at sea. It is a heavy responsibility. Without his fault and perhaps without his knowledge, without negligence and perhaps in spite of his diligence, the notice may miscarry or fail to convey sufficient information to the particular buyer, or be such as in his particular case may not enable him to insure, though in other circumstances it might suffice well enough.

In the present case the buyer was in London buying to sell,

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or at any rate to send abroad. The contract only named the port of loading. Ordinarily it would have been an implied obligation upon the buyer to declare the port of discharge within a reasonable time; here it is an express obligation that this should be done within three months. Till the buyer performs this, the seller cannot deliver. Delay in declaring is a breach, for which the seller may recover damages if he can prove them, and under certain circumstances such delay might give the seller the right to treat the contract as repudiated by the buyer.

When the buyer declared the port of discharge, Odessa, he did not name any ship or even any line by which the goods were to be sent. He might have done either or both, provided they were such as would enable the seller to get the goods delivered on board within a reasonable time and gave him a reasonable time within which to do so. No new promise or obligation can be implied from the sending or acceptance of such instructions. They are sent and complied with under and in performance of the contract of sale. In the present case the buyer's instructions were accompanied by a request to the brokers to prepay the freight and they did so. They were not bound to do so, but they were accommodating. Beyond the obligation of the buyer to indemnify them, no new obligation arose. The transaction is not, "send the goods to Odessa; choose your own ship; but let me know her name." It is, "I nominate, as the ship on which you are to put the goods free of charge, any reasonable Odessa-bound ship from Antwerp in the ordinary course of trade." There is no new transaction, separate from the contract of sale—no mandate to send nor a new contract to forward. In choosing a ship and in shipping the goods the seller is acting solely in performance of the contract of sale and the parties are governed by its terms, especially by the term "free on board." If then the seller at this stage does send the buyer notice of the ship's name, he is giving him "such notice as may enable him to insure the goods." If he does not, does he "fail" to give him such notice as may enable him to insure them? I think the answer to both questions is no. If the buyer chose, he could, as far as the practice of insurance is concerned, cover the goods himself by ship or ships, or by steamer to be declared, or in other forms.

If, owing to circumstances affecting himself, he cannot do so, or does not know the name of a suitable ship, the seller, being a stranger to them, is not affected and cannot have his obligations increased thereby. Independently of the seller, the buyer has information enough to enable him to insure, and if the seller sends none, he does not thereby fail to send an enabling notice; he merely omits to make a superfluous communication. I do not think the sub-section is meant to bind men of business to write immaterial letters, and to penalize the omission in the price of the goods if they should afterwards be lost at sea, uninsured.

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(3.) It has been argued that, in signing and sending to the buyer the contract note itself, the seller, to the benefit of whose acts the plaintiffs succeed, did give to the buyer such notice as might enable him to insure the goods. Literally this is undeniably true. The appellants say that this is a paradox, which would make every f.o.b. contract its own enabling notice and so, also, so far nullify the sub-section. I think this is true too, but my conclusion is that the paradox helps to shew that f.o.b. contracts are not within the sub-section. It is a *reductio ad absurdum*.

Whether, on giving instructions, the buyer waived any further information as to the ship's name is a question of fact not answered or, I think, raised in the Court below, on which I prefer to express no opinion.

(4.) The whole sub-section is prefaced by the words "unless otherwise agreed." The mercantile meaning of f.o.b., of the words "free on board," has long been known and is stated by the high authority of Brett M.R. in *Stock v. Inglis* (1): "If the goods dealt with by the contract were specific goods, it is not denied but that the words 'free on board,' according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage. Now that is the meaning of those words 'free on board' "

(1) 12 Q. B. D. 564, 573.

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in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on the delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached in order that the goods shall not be finally delivered to the purchaser until he has either accepted bills or paid cash."

This passage is adopted, not in terms but in substance, by Lord Blackburn in the same case in the House of Lords(1), where he too says that the seller's obligations were at an end when the goods were put on board. The important point is to observe that Brett M.R. states it as part of the mercantile meaning of f.o.b. that the buyer should do the things he mentions and no more. True the contract does not in terms say anything about giving notice, but in saying that all the seller need do is to ship, it says, in the understanding of merchants, that he need not go on to give a notice. If, instead of the letters f.o.b., their meaning were written out at length in the contract, in the words of Lord Esher, it would be plain that there was no liability upon the seller to be at the risk of the loss of the goods at sea, if he has failed to give a notice, because the parties had otherwise agreed, namely, had agreed that "the goods so put on board (without any notice called for or given) would be at the risk of the buyer, whether they were lost or not on the voyage." It is not that the common law annexes, as an incident to such a contract, that the seller should deliver on board and be liable no further. If that were so, the statute of 1893 might have altered and increased his obligations. It is that by agreement between buyer and seller in these words the contract means that only certain obligations are incumbent on the seller, and giving notice is not one of them. If so, "unless otherwise agreed" ousts the application of sub-s. 3 to an f.o.b. contract.

(5.) The appellants' argument rests on two propositions—(a) that the whole section must be read together; if f.o.b. contracts are within sub-s. 1, they cannot be outside of sub-s. 3, which is in the nature of a proviso upon sub-s. 1; and (b) that, if sub-s. 3 does not apply to f.o.b. contracts, there is nothing to

(1) (1885) 10 App. Cas. 263, 271, 273.

which it can apply, and if it does not contemplate notice (inter alia) of the name of the actual ship, it is futile, for without any notice from the seller the buyer can always insure his purchase by "ship or ships." I think both propositions fallacious. I agree that, the section being divided into sub sections, the sub-sections must be read together, but the appellants' proposition (a) would only be true if sub-s. 1 applied only to f.o.b. contracts ; then any proviso on it must apply to f.o.b. contracts too, but only then. And as it is expressed in perfectly general terms, including not only f.o.b. contracts which have a specific mercantile meaning, but any other contracts of sale, in which in any terms the seller is authorized or required to send, sub-s. 3 may have application as a proviso to contracts within sub-s. 1 other than f.o.b. contracts, and so have ample effect as a proviso upon sub-s. 1. For this reason I think this formal contention (and it is no more) is ill founded.

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Next, it is said that anything can always be insured against marine risks. Hence no notice can ever enable a buyer to insure. Knowing that he has bought, he can forthwith cover his interest by appropriate description by a floating policy (or, subject to the Stamp Act, by open cover) to be followed by a declaration. In practice this has long been done and is in fact very general.

Further, it is said that *Arnot v. Stewart* (1) may be treated as a decision on the sub-section, though in time it precedes it by over sixty years, laying down that the Scottish rule, which sub-s. 3 embodies, was a rule requiring the ship's name to be notified to the buyer. Finally, it is argued that no contracts of sale can be within sub-s. 3 if f.o.b. contracts are not, for sales ex ship operate only after the seller has run all the marine risk ; c.i.f. sales specifically deal with insurance and "otherwise agree" ; and nothing (or nothing much) is left but f.o.b. contracts to which the sub-section could relate.

It is commonly said, I know, that you can always insure anything at Lloyd's, and we have all of us in our time quoted extraordinary instances of risks covered by underwriters, but, "freak " insurances apart, one ought to recollect that insurance,

(1) 5 Dow, App. Cas. 274.

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like every other operation in commerce, is an actual thing, for which it is necessary that a person willing to risk his money in the transaction should be found, and there are times when, owing to the state of the market or of the individual underwriter's book, a particular insurance may be difficult or even impossible to effect. Again, free as the London insurance market is, and for ordinary conveyances it is in practice free almost without limit, this freedom is largely due to the fact that insurance business is centralized in London, a circumstance that for buyers resident at a distance from London or indeed from the United Kingdom may make it by no means easy for them to effect their particular insurances. Hence I do not think it would be safe to hold that the Legislature assumed the universal feasibility of insuring goods against any marine risks without particulars of ship or voyage at all times and in all places as the foundation of sub-s. 3, which, be it remembered, is of continuous, permanent, and general application. Yet nothing less than this will support the contention that the notice required must, by necessary implication, include notice of the ship's name, and for the appellants' case no less contention will do.

It is to be remembered that the Sale of Goods Act is a codifying Act. Historically it is known that the rule laid down in sub-s. 3 was before 1882 a rule of Scots law only and had no application to or counterpart in English law. Where any difficulty arises in construing the Act, it is legitimate to consider the previous decisions which it codified, as a clue to the meaning and application of the enactment. Now, looking at the Scots decisions, one notes, first, that from *Hoog v. Kennedy* (1), in 1754, to *Hastie v. Campbell* (2), in 1857, as many are decided on the relationship of principal and agent as on that of seller and buyer, and, as Lord Deas says in the last named case, "the obligation to give notice . . . arises out of and is incident to the relative position of mandatory and mandant, however constituted, although the precise degree of diligence prestable may not be the same in each relation"; next, that none are decided on f.o.b. contracts in terms; and that in every case the facts stated are consistent with the goods having been sent on the terms of "carriage forward"

(1) Bell's Illustr. 110.

(2) 19 D. 557.

or "freight payable on delivery," or with the sender charging prepaid freight to the receiver in account; and, lastly, that in those which deal with contracts of sale the seller's obligation to send the goods arises not on the sale itself but only incidentally to it, as part of a simultaneous mandate given by the buyer to the seller. The consideration for the sending may be the contract of purchase, but it is nowhere stated as one of the facts of the case that the cost of sending was not chargeable by the seller to the buyer. The highest at which the appellants can put it is that in *Arnot v. Stewart* (1) the action was brought for the price and the appellant contended that "his constituents having delivered the goods at the wharf had nothing further to do with the transaction." These considerations support the construction that f.o.b. contracts are outside of sub-s. 3, if it needs support, and they definitely answer the appellants' contention that the sub-section covers no contracts, if not f.o.b. contracts. It covers such contracts as were passed upon in the Scots cases or such as the very similar one in *Badische, &c. v. Basle, &c.* fully set out in the report. (2) They may not be important contracts individually, but they are numerous and of common occurrence. Trade between Ireland and Great Britain or between Holland and Belgium and this country, and sales to which coastwise transport is naturally incident, afford numerous instances of transactions to which the sub-section would apply, and give it abundant application apart from f.o.b. contracts.

It only remains to notice the suggestion that *Arnot v. Stewart* (1) controls the matter. On examining the report of this case I think it appears that the single reason to which the judgment is confined refers to the respondent's second contention, which was that a notice containing a representation was sent by the seller and accepted by him; that it would have resulted in an insurance had he not put a limit on the premium in instructing his insurance broker; and that an insurance effected on those instructions would not have been such as he could have enforced. I think it is pressing the report much too far to say that the case decided that the seller's notice must name the ship, or that, when the buyer had already all the information needed

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(1) 5 Dow, App. Cas. 274.

(2) [1897] 2 Ch. 322, 324.

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 1913 a notice with the ship's name, on pain of being liable for the loss
 of the goods. It is worth notice that in *Hastie v. Campbell* (1)
 this point was discussed as an open contention and was not
 relied on as a matter no longer open to argument but determined
 by *Arnot v. Stewart*. (2)

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I think that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Coward, Hawksley & Co.*

Solicitors for respondents: *Waltons & Co.*

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SMITH v. STREATFEILD AND OTHERS.

[S. No. 3282.]

Defamation—Libel—Privileged Occasion—Co-defendants—Malice of One Defendant—Printer—Ordinary Course of Business—Acts incidental to Publication.

The writer of a pamphlet employed a firm of printers to print it. This was a natural and proper means of publishing it. He then circulated the pamphlet among persons having with him a common interest in its contents. It contained statements defamatory of the plaintiff. The writer was actuated by malice. The printers acted in the ordinary course of their business and without malice:—

Held, that the privilege of the occasion extended to the printers, but that the malice of the writer defeated the privilege both for the writer and for the printers, and that they were joint tortfeasors and jointly liable to the plaintiff.

FURTHER CONSIDERATION before Bankes J.

The plaintiff was an architect and surveyor and was a surveyor of ecclesiastical dilapidations for the diocese of Oxford.

The defendant the Reverend Canon G. S. Streatfeild was the rector of Goddington within the said diocese. The defendants the Robert Spennell Press were printers and publishers.

The action was for libel. The statement of claim alleged that

(1) 19 D. 557.

(2) 5 Dow, App. Cas. 274.

in October, 1912, the defendants falsely and maliciously printed and published of and concerning the plaintiff in his business and office to the rural deans of the diocese a certain pamphlet.

The defendant Canon Streatfeild admitted the printing and publication of the pamphlet, but pleaded that it was printed and published on a privileged occasion. He further said "that the words complained of . . . taken in their natural meaning so far as they purport to express facts were and are true in substance and in fact and so far as they purport to express opinion were and are fair and honest comment upon the said facts which were a matter of common interest to this defendant and the persons to whom the said words were published . . ."

The defendants the Robert Spennell Press admitted the printing and publication of the words complained of. They pleaded that in their natural and ordinary meaning the words were true in substance and in fact. They further pleaded as follows : "Further or in the alternative the defendants say that the said words were printed and published to the rural deans of the diocese of Oxford. The said rural deans together with the archdeacon are the body empowered by s. 8 of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), to appoint from time to time a surveyor of ecclesiastical dilapidations for the diocese of Oxford. The plaintiff's term of office as such surveyor will expire in or about the year 1914. The said words were published by the defendant G. S. Streatfeild bona fide and without malice in order to lay before the said rural deans the information contained in the said pamphlet so that they might be in a position to exercise a proper judgment as to the reappointment or rejection of the plaintiff in the event of his offering himself for re-election. By reason of the premises the defendant Streatfeild had a common interest with the said rural deans in the subject matter of the said pamphlet and/or was under a duty to communicate the said information to them. These defendants printed and published the said words bona fide and without malice for and on behalf of the said defendant G. S. Streatfeild and these defendants therefore say that the said publications and the occasions thereof were privileged."

The jury found that the words were not true in substance or in

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fact; that the defendant Canon Streatfeild was actuated by malice; that the defendants the printers were not actuated by malice. They assessed the damages at 50*l*.

Sir F. Low, K.C., and Kerly (F. E. Bray with them), for the plaintiff. The plaintiff is entitled to judgment against the Robert Spennell Press as well as against the defendant Streatfeild. The only privilege which the printers claim is the privilege of the defendant Streatfeild, but as he has abused his privilege it cannot avail him and consequently it cannot avail them. They have simply participated in his wrongful act. Their claim of privilege amounts to no more than this, that if their co-defendant had acted otherwise they would not have been wrong-doers.

McCardie, for the defendants the Robert Spennell Press. These defendants are entitled to judgment. The evidence must shew that the defendants themselves were actuated by malice; otherwise the plaintiff cannot recover against them. It is not enough to shew that some one else was so affected: *Hennessy v. Wright*. (1) In an action against the publisher of a magazine evidence of the writer's personal malice is inadmissible: *Robertson v. Wylde*. (2)

Further, these defendants having printed and published the pamphlet in the ordinary course of business may claim a privilege separate and distinct from that of their co-defendant. Where matter is published on a privileged occasion all incidental acts such as printing or copying, if done in the ordinary course of business, are privileged also: *Baker v. Carrick*. (3)

McCall, K.C., and E. G. Palmer, for the defendant Streatfeild.

Sir F. Low, in reply. There is no authority for the position that printers can claim privilege on the ground that printing was in the ordinary course of their business and incidental to the publication of the matter complained of. The words of Lord Macnaghten in *Macintosh v. Dun* (4) apply most aptly to these defendants: "What is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their

(1) (1888) 24 Q. B. D. 445, n.

(2) (1838) 2 Moo. & R. 101.

(3) [1894] 1 Q. B. 838.

(4) [1908] A. C. 390, at p. 400.

motive is self-interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit." They admit the printing and publication of a libel. The only way in which they can set up a privilege is by sheltering themselves behind their co-defendant. His privilege does not cover him and consequently they stand unprotected.

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July 23. BANKES J. read the following judgment :—In this case the plaintiff brought his action for libel, alleging a joint publication by the defendants of certain pamphlets to the rural deans in the diocese of Oxford. The defendant Canon Streatfeild was the author, and the defendants the Robert Spennell Press were the printers, of the pamphlets. The printers admitted the publication complained of. Each of the defendants pleaded a justification, and further that the occasion was privileged and that the publication was bona fide and without malice.

The facts relied on as constituting the privilege were that the plaintiff was one of the diocesan surveyors for the diocese of Oxford and that his re-election to the office rested with the rural deans; that the defendant Canon Streatfeild was bringing to the notice of the rural deans matters affecting the plaintiff in relation to a survey he had made of a rectory house and glebe in the said diocese in which the defendant Canon Streatfeild was directly interested as rector, and that these were matters which it was material for the rural deans to know. As regards the defendant Canon Streatfeild the privilege was admitted.

At the end of the plaintiff's case Sir Frederick Low on his behalf submitted that the above facts did not create any privilege as regards the defendants the printers; and Mr. McCardie for the printers submitted that his clients were entitled to judgment on the ground that the privilege created by the facts above stated, and admitted as regards the defendant Canon Streatfeild, extended to protect the printers also, and that no evidence of malice on the part of the printers had been given by the plaintiff. I reserved both points and stated my intention of putting questions to the jury to obtain their answers on all material points, including the question whether separate verdicts could be given against the

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defendants. I understood that this course was acquiesced in by all parties, and no objection was taken to the questions as subsequently formulated by me.

These questions were five in number, and may be summarized as follows: First, whether the justifications were proved; secondly, whether the defendant Canon Streatfeild was actuated by malice; thirdly, whether the printers were actuated by malice; fourthly, what damages if one verdict against both defendants; and, fifthly, what damages if a separate verdict against each defendant. In reply to these questions the jury found that the justifications were not proved, and that Canon Streatfeild was actuated by malice, but that the printers were not. If one verdict was given they assessed the damages at 50*l*. In reply to the last question the jury first said that they found the whole sum against Canon Streatfeild and nothing against the printers; but when I pointed out to them that it was necessary, in order to cover all possible questions, that some sum should be given, and suggested 20*s*. as a nominal sum, they agreed to this, and gave that figure as their verdict against the printers if it was permissible to take two separate verdicts.

The matter came on before me on further consideration, when Mr. McCall for Canon Streatfeild contended that, having regard to the answers of the jury to the fourth and fifth questions, no judgment could be entered against his client. I do not agree with this contention, as I consider that the questions were put by the assent of all parties in order to avoid a new trial, and that I am entitled to treat the matter as though I had ruled at the time (as I should have ruled had I been asked to do so) that one verdict only could be given. I consequently, for the present purpose, treat the fifth question as though it had not been put, and I give judgment for the plaintiff against the defendant Canon Streatfeild. As regards the printers, I am of opinion that the privilege created by the facts above set out extends to them. It was, in my opinion, a natural and proper course, in order to get the pamphlet published, to have it printed, and I consider that the principle laid down in the case of *Baker v. Carrick* (1) applies here.

It remains only to consider the proposition contended for by Mr. McCardie that the printers are entitled to judgment, as the jury have negatived any malice on their part. Mr. McCardie's contention in substance amounted to this, namely, that his clients' privilege was what he called an incidental privilege—that is to say, that, though it arose out of the same facts as constituted the privilege of Canon Streatfeild, it was independent of it in the sense that his clients were entitled to the protection of the privilege even though Canon Streatfeild might have disentitled himself to any protection. It appears to me that Mr. McCardie's argument fails, whether the question is regarded from the point of view of the law applicable to privilege, or of the law applicable to the case of joint tortfeasors. To take the last first: the publication here complained of was a joint publication—that is to say, a single publication to each rural dean for which both defendants were jointly responsible. This publication was admitted by the printers. The finding of the jury establishes the fact that the defendant Canon Streatfeild was a tortfeasor as regards this publication. It necessarily follows, in my opinion, that the printers are joint tortfeasors with him. The ordinary rule of law is that each tortfeasor is liable for all the consequences of the joint tort. In *Clark v. Newsam* (1) Rolfe B. states the rule thus: "When two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act." In my opinion it follows from this rule of law that in the case of a joint publication of a libel each tortfeasor is liable for the malice of the other. It may very well be that in assessing damages the jury may take into account the fact that one of the two persons jointly responsible for the publication of the libel may be morally blameless, and may consequently refuse to give anything in the nature of vindictive damages in a verdict which will affect him, but this does not affect his liability for the publication.

The same result, in my opinion, follows if the matter is looked at from the point of view of privilege. The principle upon which the law of qualified privilege rests is, I think, this: that where words are published which are both false and defamatory the law

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presumes malice on the part of the person who publishes them. The publication may, however, take place under circumstances which create a qualified privilege. If so, the presumption of malice is rebutted by the privilege, and in an action for libel or slander founded on a publication upon a privileged occasion the plaintiff has to prove express malice on the part of the person responsible for the publication. The effect of proving express malice is sometimes spoken of as defeating the privilege. This is a convenient expression, and conveys in a single word a correct idea of what has really happened, namely, that, although the occasion remains a privileged occasion, the privilege afforded by the occasion ceases to be an effective weapon of defence. The reason for this is obvious. Qualified privilege is a defence only to the extent that it throws on the plaintiff the burden of proving express malice. Directly the plaintiff succeeds in doing this the defence vanishes, and it becomes immaterial that the publication was on a privileged occasion. Qualified privilege in one sense may be said to be the privilege of the individual, in that it arises out of the circumstances in which the individual is placed, but as a defence it is attached to the publication. Where therefore, as here, the plaintiff is complaining of a joint publication, if the defence of privilege as to that publication fails because of the proof of express malice, it fails, in my opinion, altogether, and the plaintiff establishes his right to succeed in respect of that particular publication.

From whichever point of view, therefore, Mr. McCardie's contention is approached, the result is, in my opinion, the same, and his clients cannot derive any benefit, so far as liability for the publication of the libel is concerned, from the fact that the jury have negatived any express malice on their part. In the result, therefore, I give judgment against both defendants for 50*l.* damages.

Judgment for plaintiff.

Solicitors for plaintiff: *Kerly, Sons & Karuth.*

Solicitors for the defendant Streatfeild: *Marshall & Pridham.*

Solicitors for the defendants the Robert Spennell Press:
Whitelock & Storr, for A. R. Whitelock, Birmingham.

W. H. G.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF
APPEAL.]

HERD *v.* WEARDALE STEEL, COAL AND COKE
COMPANY, LIMITED AND OTHERS.

[1912 H. 455.]

K. B. D.

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June 11, 12.

*False Imprisonment—Miner in Coal Mine—Refusal to work—Refusal of
Employers to afford Facilities for leaving the Mine.*

The plaintiff, a miner, descended a coal mine at 9.30 A.M. for the purpose of working therein for his employers, the owners of the colliery, for a period of time which under his contract of employment would expire at 4 P.M. On arriving at the bottom of the mine the plaintiff was ordered to do certain work. He wrongfully refused to do the work, and at 11 A.M. requested to be taken to the surface in a lift which was the only way in which he could leave the mine. By the orders of his employers he was not permitted to use the lift until 1.30 P.M., although the lift had before that time been available for the carriage of the plaintiff to the surface. The plaintiff was in consequence obliged to remain in the mine against his will until 1.30 P.M. In respect of this detention the plaintiff sued his employers for damages for false imprisonment:—

Held by Buckley and Hamilton L.JJ., Vaughan Williams L.J. dissenting, that the action could not be maintained, on the ground that the refusal of the defendants to afford the plaintiff facilities for leaving the mine at a time when as between them and the plaintiff they were under no contractual obligation to do so did not in law constitute an imprisonment of the plaintiff.

Held by Vaughan Williams L.J., that the true inference to be drawn from the facts was that the defendants had caused the plaintiff to be detained in the mine in order to punish him for his refusal to work, and that there had been a false imprisonment of the plaintiff.

Judgment of Pickford J. reversed.

APPEAL of the defendants from the judgment of Pickford J. at the trial of the action at the Northumberland Assizes without a jury.

The action was brought to recover damages for false imprisonment. No witnesses were called at the trial, as it was admitted by counsel for the defendants that the material facts had been accurately stated by counsel for the plaintiff in his opening speech. The facts so stated were as follows: The plaintiff was a hewer of coal employed at Thornley Colliery, in the county of Durham, of

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which colliery the defendants the Weardale Steel, Coal and Coke Company, Limited, were the proprietors, the defendant Curry was the manager, and the defendant Turner was an overman employed in the colliery. At about 9.30 A.M. on May 30, 1911, the plaintiff descended the mine with the intention of working. The shift of which the plaintiff was one of the workmen would not have come to an end until 4 P.M. After descending the mine, according to the practice the plaintiff and two other men were directed by a man called the deputy overman to do certain work. The plaintiff and the two other men, bona fide believing that the work in question was unsafe and that the order was in breach of an agreement which had been entered into between a representative of the men and the manager of the colliery, refused to do the work, and at about 11 A.M. the plaintiff and the two men and twenty-nine other men acting in sympathy with them requested the defendant Turner to allow them to ascend the shaft by means of the cage, as they desired to leave the mine. Turner told them that he had orders to prevent them from going up in the cage. The only means of egress from the mine was by the cages, one ascending and the other descending at the same time. The cages were used for the conveyance of workmen and coal, but when being used for coal workmen were not allowed to enter them. The cages went up and down several times during the morning on the day in question, but on these occasions coal was being carried. At about 1 P.M. a signal came from the bank at the top indicating that some men or boys were about to come down, the cage at the bottom of the shaft then being empty. The men were told that they must not enter the cage. Some of the men, but not the plaintiff, did get in, and in order to prevent the plaintiff and the other men from leaving the mine the cages remained stationary until about 1.30 P.M., when permission was given to the plaintiff to enter the cage, which he did, and the cage then went up and the plaintiff left the mine.

Subsequently proceedings were taken by the defendant company against the plaintiff in a Court of summary jurisdiction under the Employers and Workmen Act, 1875, to recover damages in respect of the plaintiff's breach of contract, and the Court awarded the defendant company 5s. damages.

The plaintiff alleged by his statement of claim that the

defendants had wrongfully prevented the plaintiff from using, and had wrongfully refused to the plaintiff the use of, the cage which was the only egress from the mine, whereby the plaintiff was falsely imprisoned in the mine from about 11.30 A.M. to 1.30 P.M.

The defendants by their defence denied that they had imprisoned the plaintiff, and pleaded further as follows :—

“2. The plaintiff in refusing to do the work he was ordered to perform and in seeking to leave the said colliery was guilty of a breach of contract and a breach of his duty as an employee at the said colliery, and if the defendants did the acts alleged (which is denied) they were lawfully entitled so to do the same.

“3. The defendants say further that the plaintiff required to make use of the cage referred to on the occasion referred to in the particulars in order to leave the said colliery and to absent himself from the service of his employers the defendant company (as he ultimately did do at about 1.30 P.M. on the said May 30, 1911) in breach of his contract and duty aforesaid wherefor and not otherwise the defendants (if at all) prevented the plaintiff from using and refused him the use of the said cage (which is the alleged prevention and refusal) and they say that on June 24, 1911, in certain proceedings under the Employers and Workmen Act, 1875, taken by the defendant company against the plaintiff in respect of his said breach of contract and duty before a Court of summary jurisdiction for the petty sessional division of the South Division of Earington Ward in the county of Durham it was duly adjudged that the plaintiff in so seeking to absent himself and in absenting himself from his said employers' service had been and was guilty of a breach of his said contract and duty, and the defendants will contend that the plaintiff is estopped by such judgment from alleging that the alleged prevention and refusal were wrongful, and that by reason thereof and of his said breach of contract and duty he is not entitled to maintain his action or to recover damages for false imprisonment or otherwise in respect of the alleged prevention and refusal.”

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The defendants by their particulars and answers to interrogatories alleged that the plaintiff's contract with the defendant company, which was terminable by a fortnight's notice, was an oral contract on the part of the plaintiff to work as a hewer

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when required at Thornley Colliery for the plaintiff's shift subject to the Coal Mines Regulation Acts and the Special Rules made thereunder for the conduct of persons employed in Thornley Colliery, and subject to the agreements between the Durham Coal Owners' Association and the Durham Miners' Association, and subject to the orders of the officials of the colliery, and to leave the colliery by the cage at the conclusion of his shift as and when directed so to do by the official. Rule 90 of the Special Rules provided that every workman should strictly attend to the directions of the manager or other authorized persons with respect to all matters connected with the working of the mine and the proper discipline of the persons employed therein; and rule 94 provided that every person should enter and leave the cage as and when ordered to do so by the banksman, onsetter, or other authorized person. In answer to an interrogatory (No. 3) the defendant Curry stated that upon being informed of the plaintiff's conduct he gave instructions that he was not to be allowed to use the cage until the conclusion of his shift.

Tindal Atkinson, K.C., and Griffith Jones, for the plaintiff.

Mitchell Innes, K.C., and Lowenthal, for the defendants.

Cur. adv. vult.

1912. Nov. 30. PICKFORD J. This is an action brought by the plaintiff, a miner, against his employers, the mine owners, for false imprisonment, the false imprisonment being that the defendants refused to allow the plaintiff to leave the mine at the time that he wished to do so; and of course the difficulty that arises is caused by the fact that a man is not able to leave the mine unless he comes out in the cage. He cannot walk out of the mine as he can walk out of a house where the door is unlocked, but he is obliged to make use of the appliances for going from the bottom of the mine to the surface.

The facts of the case are really not in dispute. It seems that on May 30, 1911, the plaintiff and other men went down the mine. They had to work there and they went down in a shift which would be normally ended at 4 o'clock in the afternoon. When they got down they refused to work at the work to which

they were sent. I think there is no doubt that there was a bona fide dispute as to whether they were ordered to work under conditions in which they were entitled to refuse. They were afterwards decided at a Court of petty sessions to have been in the wrong, and for the purposes of my judgment I assume they were in the wrong, in refusing to work. Having refused to work they at once wished to go to the surface. They were not allowed to do so. There were, I think, several occasions on which the cage came down during the morning, but on many of those occasions it was being used for the purpose of hoisting coal. It was not, as I understood the argument, contended before me that under those circumstances the men would be entitled to use the cage for the purpose of going to the surface. But about 1 o'clock the cage came down, and it came down under circumstances in which, so far as the presence or absence of coal was concerned, the men would be at liberty to use it. It came down also under circumstances in which the plaintiff would have been entitled to use it for the purpose of going to the surface but for the right that was claimed by the defendants in requiring the man to remain in the mine. He was detained a very short time after that cage came down about 1 o'clock, but it was quite sufficient to be technically a slight imprisonment, if he had the right to go up, and it was quite enough detention to raise the question in this case.

I am inclined to think that the men at first were claiming the right to leave the mine at any time that they wished, and to have the cage sent for them in order that they might leave the mine at any time, whether that did or did not fall in with the general working of the colliery. I do not understand that to have been the point which was argued before me, and I certainly am not prepared to assent to such a proposition as that. I am not prepared to hold that miners who may have refused to do their work are entitled at any moment, irrespective of any disarrangement that may be caused to the working of the mine, to require the cage to be put at their service for the purpose of going to the surface. But these were not the circumstances in which the plaintiff was refused admission to the cage at 1 o'clock on this day. It was there, as I have said, under

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circumstances in which the plaintiff would have been entitled to use it and to leave the mine but for the right that was claimed by the defendants. The right, as I understand it, which was claimed by the defendants was this: that as, they say, the plaintiff had contracted to work for that shift and was impliedly to remain in the mine until the end of the shift they were entitled to retain him in the mine until the end of the shift, whether he wished to remain or not; in fact practically to enforce his performance of his contract by not allowing him to leave the mine until the end of the time when the performance had been made. It is only if that contention be good that they can justify detaining him in the circumstances in which they did in this case.

I do not think the defendants can maintain that proposition. I hold that it is not correct to say that, if miners go down for the purpose of working a shift and then decline to do so, even wrongfully, the mine owner is entitled to detain them against their will in the mine until the end of the shift comes, although the cage may have been in the mine and going to the surface in circumstances in which the miner would have been entitled to use it. I think, therefore, that this detention after the cage was available at 1 o'clock is one that cannot be justified, because I think it only could be justified if the defendants could maintain that large proposition, which I do not think they can maintain.

Some argument was founded upon the fact that afterwards proceedings had been taken before a Court of petty sessions or before the magistrates and that the defendants had recovered damages for the plaintiff's and the other men's breach of contract. I do not see that that can have any bearing upon the question I have to decide here. The action of the defendants through their deputy overman was either right or wrong at the time it was done; and it does not seem to me that the nature of the act can be affected by any proceedings that afterwards took place before the justices.

I have had several authorities cited to me, but I do not think that any of them give me any real assistance in this case, therefore I have not discussed them.

In these circumstances, therefore, I think there must be judgment for the plaintiff. It is a merely nominal detention and I shall only give nominal damages, 20s. But as the defendants can only justify their action by the establishment of the large principle to which I have alluded, namely, that in the case of breach of contract by the men they are entitled, whatever the circumstances, to detain the men in the mine till the end of the shifts, and as they have defended the action for the purpose of establishing that right, and as that principle is essentially a matter in the action, I think the plaintiff should have his costs of the action. There will be judgment, therefore, for the plaintiff for 20s. and costs on the High Court scale.

Judgment for plaintiff.

The defendants appealed. The appeal was heard on June 11 and 12, 1913.

Sir R. Finlay, K.C., and *Mitchell Innes, K.C.* (*Lowenthal* with them), for the defendants. On the agreed facts an action for false imprisonment will not lie. The plaintiff went down into the mine in order to work for the defendants, the colliery proprietors, in pursuance of a contract of service, and the defendants' obligation to afford him facilities for leaving the mine depends on the contract between the parties. Even assuming that the failure to place the lift at the disposal of the plaintiff at the first moment at which he desired to use it was a breach of contract on the part of the defendants, that would not support an action for false imprisonment. The essence of false imprisonment is that it is a tort, and a breach of contract does not constitute the tort of false imprisonment. Suppose a man engaged a boatman to row him from the mainland to an island, to leave him there, and to fetch him back at 4 P.M., could it be successfully contended that, if the boatman did not come for him at the agreed time, he could maintain an action for false imprisonment against the boatman? But the defendants did not in fact commit any breach of contract towards the plaintiff. Under the terms of his employment the plaintiff was bound to remain in the mine until the end of the shift, and the defendants were not bound to afford him any facilities for leaving the mine

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until he had performed his allotted work, unless possibly some emergency, such as illness or an accident, occurred in the course of the work. The plaintiff by refusing to do the work which he was ordered to do committed a breach of his contract with his employers. The fact that he had broken his contract could not give him greater rights or impose greater obligations upon his employers, in the matter of his leaving the mine, than would have been the case if he had performed his contract. The employers do not claim the right to punish their workmen for refusing to work by detaining them in the mine until the conclusion of the shift; their contention is that they are under no contractual obligation to provide facilities for leaving the mine at any particular time that a workman who has refused to work chooses to call upon them to do so. [They referred to *Bird v. Jones* (1), *Willes v. Bridger* (2), and *Robinson v. Balmain New Ferry Co., Ltd.* (3)]

Tindal Atkinson, K.C., and *Griffith Jones*, for the plaintiff. The case raises an important question as to the right of masters to keep men down in the pit until the full expiration of the hours of their shift. The position of the defendants is untenable unless they can shew that the contract involved the right of the masters to say that under no circumstances were the men entitled to come up by the cage until the expiration of their time. There is no contract here which gives the masters any such right. The employers had their remedy against the plaintiff for refusing to work by taking proceedings to recover damages, which were actually taken in the present case. It is wrong to say that the defendants merely refused to grant the plaintiff facilities for getting out of the mine; they gave orders which prevented him from doing so. If a man were working on the roof of a house, his master would have no right to remove the ladder and keep him on the roof because he wrongfully refused to work. A man who works underground is not to be deprived of the right which every workman possesses of refusing at any moment to go on with his work, subject to his liability for breach of contract. The true inference to be drawn from the admitted facts is that

(1) (1845) 7 Q. B. 742.

(2) (1819) 2 B. & Ald. 278.

(3) [1910] A. C. 295.

the masters wished to keep the plaintiff and the other men in the mine until the conclusion of the shift in order to punish them for their refusal to work and to deter others from acting in a similar manner in the future. The facts shew a false imprisonment because, as was said by Williams J. in *Bird v. Jones* (1), there was "that entire restraint upon the will which, I apprehend, constitutes the imprisonment." Further, the acts of the defendants cannot be justified under the terms of the plaintiff's contract of service because they were a contravention of s. 16, sub-s. 1 (c), of the Coal Mines Regulation Act, 1887, which requires that proper apparatus for raising and lowering persons at each shaft "shall be constantly available for use."

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Mitchell Innes, K.C., in reply. The plaintiff in addition to having committed a breach of contract was guilty of a continuing criminal offence. Under the Special Rules applicable to this colliery, made under s. 51 of the Coal Mines Regulation Act, 1887, the plaintiff was bound to attend to the directions of the officials of the mine on all matters connected with the working of the mine (rule 90); he was not entitled to go into any other part of the mine than that in which he was placed by the officials (rule 91); and rule 94 prohibited him from entering or leaving the cage except as and when ordered to do so by the banksman; and by rule 36 of the General Rules made under s. 49 of the Act of 1887 he was bound to observe such directions as were given him with regard to working. A contravention of these rules is by ss. 50 and 51 of the Act made a criminal offence. [He referred to *Colbeck v. Whitwham*. (2)]

VAUGHAN WILLIAMS L.J. The argument that has been addressed to us by counsel for the defendants in reply appears to me to be based upon somewhat different considerations from those dealt with by Sir Robert Finlay in his opening speech. We have had some discussion as to the nature of this action, and I think, therefore, that I had better call attention to the cause of action as alleged on the pleadings. [The Lord Justice read the statement of claim and the particulars, and continued:] The cause of action alleged is for false imprisonment. No doubt,

(1) 7 Q. B. at p. 748. (2) (1912) 107 L. T. 22.

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in an action for false imprisonment it may become necessary according to the circumstances of the case to consider, before deciding that there has been a false imprisonment, the contractual relationship of the parties; but that does not make the action an action of contract; it still remains an action of tort. The defendants by their amended defence, in paragraph 1, deny the alleged false imprisonment; paragraph 2 alleges in effect that in the circumstances of the plaintiff's breach of contract the defendants were entitled to prevent his leaving the colliery. In paragraph 3 the defendants allege that it had been adjudged by a Court of summary jurisdiction that the plaintiff had been guilty of a breach of his contract with the defendants and that the plaintiff was thereby estopped from alleging that the alleged prevention and refusal were wrongful and was not entitled to maintain the action. I have referred to the pleadings because there seems to be some doubt as to what the cause of action was. It is quite clear that it is an action for false imprisonment, and the contention of the defendants as I understood it in the first instance was that, while it was not denied that what the defendants did through their servants was in consequence of the misconduct of the plaintiff and the other men in refusing to obey orders, yet it was not suggested that the detention could be justified as a penalty imposed upon the men for their breach of duty, but that it could be justified upon the basis that there was no obligation upon the defendants to provide facilities for the men to leave the mine between the times fixed by the statutory rules for their descent and ascent. The contentions raised in counsel's reply came to me as entirely novel questions.

The facts are not in substance in dispute, for it was admitted at the trial that the material facts stated by counsel for the plaintiff in his opening speech were correct. [The Lord Justice read so much of the opening speech as dealt with the facts, and continued:] The learned counsel stated that the question of law was whether the masters were in the circumstances justified in detaining the men in the pit. I entirely agree that that is the question, and I have come to the conclusion that if the circumstances did not justify the masters in detaining the men, that would support an action for false imprisonment.

The men bona fide and honestly thought that it was dangerous for three men to work at one time in the narrow space in which they were required to work, and they were refused the use of the lift on the ground that, according to the rules made under the Coal Mines Regulation Act, the men were to go down into the mine for a shift of seven hours and ten minutes and to return to the surface at the end of the shift. It is not in dispute but that the men after their refusal to work asked to be allowed to go up in the lift and were refused permission, although the lift was not being used for any other purpose and was available for the ascent of the plaintiff to the surface if permission were given; nor is it in dispute but that the manager of the mine occupied the lift for the carriage of coals and neglected to send down the boys at the ordinary time for the very purpose of preventing the men, who had refused to obey an order because they bona fide thought it dangerous, from having the opportunity of coming up in the lift after permission had been refused in the way I have stated. The Coal Mines Regulation Act, 1908, s. 1, sub-s. 1, provides that a workman shall not be below ground in a mine for the purpose of his work and of going to and from his work for more than eight hours during any consecutive twenty-four hours; and by sub-s. 3 notices are required to be posted at the pit head of the times for the lowering and raising of each shift of men. I think that those provisions were intended for the protection of the men, to prevent the men from being kept underground for more than the time specified in the Act, and not for the purpose of compelling the men to work for the full limit, or to relieve the colliery proprietor from the obligation of allowing the men to have the use of the lift during the hours limited for work underground. And I gathered from the argument of Sir Robert Finlay on behalf of the defendants that he admitted the obligation of the masters to allow the men the use of the lift, even though the labour hours of the shift had not expired, on reasonable occasions such as an urgent message from home on account of illness or an accident.

The action is not an action based on contract. It is an action of tort, and the question is whether there was by the masters such an unreasonable refusal by the manager of the mine to

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allow the men who had refused to do the work, which they bona fide thought to be dangerous, the use of the lift as to constitute in law false imprisonment. As I have said, I do not think that Sir Robert Finlay pressed any argument based on the time of work being fixed by statute. His argument rather was that there was no obligation to afford facilities to miners to go up to the surface during the interval between descent into the mine and the completion of the shift. What is said on behalf of the masters is that there is no obligation to supply lift facilities for miners to reach the surface until the shift hours are over and the lift goes up at the appointed time. Instances intended to be analogous were put forward, instances in which the lift or the lift man happened in the ordinary course of business to be otherwise engaged, and numerous examples were given under which it was said that the obligation would not arise; but most of them were cases in which the facility was not in fact on the spot, as where a boat used for conveying a man to an island in the morning had been taken away with orders to the boatman to return at a fixed hour in the afternoon. Such a case is quite different. The lift, the facility for ascent, is always in the mine and it is free for use, but at a time when there was no coal or anything else to occupy the lift the men asked for leave to ascend to the surface and it was refused. The case, to my mind, does not differ a jot from the case where there is a staircase instead of a lift and the manager has the key of the gate in his pocket, but, on being asked to open the gate which gives access to the stairs, refuses to produce the key, and thus of his own will prevents the men from using the staircase for no other reason whatsoever than his own will. It was stated by Mr. Tindal Atkinson in his opening speech at the trial that the case arose out of what he understood was becoming the practice on the part of the masters to exercise what they thought was a legitimate power, but which the men thought to be unlawful. On the admitted facts I should unhesitatingly come to the conclusion that the men were refused the use of the lift by way of punishment for their refusal to work; in fact the defendants' answer to the third interrogatory practically admits that they kept the plaintiff in the mine because he had been guilty of a breach of contract, and the argument of Mr. Mitchell Innes

seems to me to admit of this conclusion. This, to my mind, entirely differentiates this case from the case of a mere failure to provide facilities, and in my opinion justifies the action for false imprisonment.

None of the cases cited seem to militate against the conclusion at which I have arrived. The only case which really seems to me to be approximately relevant to the question of law which we are dealing with is *Bird v. Jones*. (1) Leaving out of consideration the judgment of Denman C.J., who differed from the rest of the Court, I cannot find that there is anything in the judgments of either Williams J. or Patteson J. which in any way militates against the conclusion that I have arrived at. Williams J. (2) said: " 'Every confinement of the person' (according to Blackstone) 'is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets,' which perhaps may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke in his second Institute (3) speaks of 'a prison in law,' and 'a prison in deed:' so that there may be a constructive, as well as an actual, imprisonment: and, therefore, it may be admitted that personal violence need not be used in order to amount to it." I shall be very much surprised if I hear that to detain a man by not allowing him to go out of a room or out of any other place is not false imprisonment, unless the detention can in some way or other be justified. I say, as I have already said, that it is an admitted fact in this case that the detention of these men was not for the purpose of carrying out the work of the company, but was a detention which would not have been ordered unless these men had refused to do this dangerous work. In my opinion that amounts to a false imprisonment. When I read the judgment of Pickford J., although he does not deal with the question issue by issue as he would have dealt with it if he had been summing up to a jury, I take it that, as he gave judgment generally for the plaintiff, he meant that there had been false imprisonment.

I think this case is a very important one. It has been sought

(1) 7 Q. B. 742.

(2) 7 Q. B. at p. 747.

(3) 2 Inst. 589.

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to minimize the question that has been raised, but I think that if this action had not been brought the men would have left the masters in the position of being able to say that they had the right to refuse to allow their workmen who refused to obey an order to come up to the surface. I wholly deny that any such right exists. I know that it is said that the masters only abstained from affording a facility of access to the surface which they were under no obligation to supply. I think that they did much more than merely refuse facilities because they were under no obligation to afford them. I think that it is a legitimate conclusion from the admitted facts that the defendants refused permission to the men to use the lift as a penalty or punishment for their refusal to obey the order.

I think that this appeal ought to be dismissed.

BUCKLEY L.J. The plaintiff is a coal miner. The defendants are the colliery company in whose employment he was, and the manager of the colliery and an overman at the colliery. The action is brought for damages for false imprisonment. The plaintiff by his particulars says that the defendants "by their orders wrongfully prevented the plaintiff from using, and wrongfully refused the use of, the said cage to the plaintiff, whereby the plaintiff was falsely imprisoned." The action was tried at Newcastle before Pickford J. without a jury, and the judgment was delivered at Leeds. No evidence was called. I regret that that is so, because we have to get the facts as best we can from the opening speech of counsel for the plaintiff, coupled with some statements by way of admission and qualification made by counsel for the defendants. I will state as accurately as I can the material facts which I have gathered from those speeches.

The plaintiff went down the mine on a shift at about half-past 9 in the morning. The shift would be over and he would be entitled to come up again at about 4 P.M. The plaintiff and two other men were ordered to do certain work. The men said that it was work which they could not be called upon to do, and they refused to do it. At a later date it was determined by a Court of summary jurisdiction that the men were wrong, but in my opinion that does not really affect

this case. The result of the refusal of these three men to work was that twenty-nine other men, out of sympathy with them, also refused to work. The men, the twenty-nine and the three, thereupon made their way to the bottom of the shaft, and arrived there at about 11 o'clock. The cage was then and until 1 o'clock engaged in winding coal, and while that is being done it is illegal to carry men in the cage. At 1 o'clock it ceased to wind coal. At that moment, as of course would be the case, there was one cage at the surface and another at the bottom. There were some lads at the surface whom the manager desired to bring down. He could not bring them down except by hauling up at the same time the cage which was at the bottom, and if that had been done the plaintiff could have gone up in that cage. Eight men out of the twenty-nine took their seats in the cage, although I believe they were told not to do so. The cage was not started. That state of things continued for about twenty minutes. At the end of that time the desire to send the boys down prevailed over the desire not to bring the men up. The plaintiff was told that if he liked he might get into the cage as it was going up. The cage went up, and he got to the surface and went away. These, so far as I can gather them, are the material facts. The plaintiff says "The cage was, or ought to have been, at my disposal twenty minutes before the time at which in point of fact it was placed at my disposal. I was falsely imprisoned for twenty minutes." It makes no difference, of course, that it was only for a short period of time. If he was falsely imprisoned for a time, although it may have been short, he is entitled to damages.

The question for decision is, were the defendants guilty of false imprisonment? Upon that question there are two things to be determined. First, was there an imprisonment? If that be answered in the affirmative, the further question arises, was it a false imprisonment? If the first question is answered in the negative, the second question does not arise. False imprisonment is wholly a matter in tort, but, for reasons which will become apparent presently, I am going to consider the plaintiff's rights in contract as well as his rights and remedies in tort.

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I conceive that the plaintiff's rights in contract were these. He had been taken by his employers down the shaft to his work to a place from which it was impossible to return except by the cage. It results, I think, that the law will imply in the contract a term that he shall be restored from the place to which he had been taken to the surface at a proper time. It is said that that ought to be any reasonable time. That is only another way of saying that in the contract, although not expressed, it is implied by law that the plaintiff shall be brought back to the surface at such time as it must have been in the contemplation of the contracting parties that he should be brought back. What would that include? Obviously it would include that when the plaintiff's shift was over he should be brought back; also, if he were ill. These are but instances. It would include as an implied term that he should be brought to the surface at any such time as it must have been fairly within the contemplation of the contracting parties that he should be brought back. But it would not include an implied term that he should be brought back at whatever time he liked. His right was to be brought back at such a time as the parties must have contemplated as a proper time. After the plaintiff had been in the mine for a short time he committed a breach of his contract in refusing to do his work, and he then demanded to be taken to the surface, a thing which was outside his contract. Being a person who had broken his contract, he had, shall I say, the assurance to ask his employers to assist him in carrying that breach of contract into effect, that is to say, to assist him in cutting short the period of seven hours during which he ought to have stayed down, by taking him up to the surface at that moment. Obviously there was no implied term in the contract requiring the employers to do that. Therefore at the time when the plaintiff desired to be taken to the surface he had no contractual right to call upon his employers to afford him the necessary facilities, and as far as the contract between the parties was concerned the defendants were entitled to refuse to do so.

What were the plaintiff's rights in tort? In the words of Patten J. in *Bird v. Jones* (1) he had the right to say, "If one

(1) 7 Q. B. at p. 751.

man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room." But is it true to say that the defendants compelled the plaintiff against his will to remain in the mine and imprisoned him? To my mind it is not. It is true that he could not leave the place; but he was detained there, not by any act of the defendants, but by a certain physical difficulty arising from the situation of the place, a difficulty which the plaintiff was, as between himself and his employers, contractually entitled to call upon them to remove for him at a time, but not at that time. What kept him from getting to the surface was not any act which the defendants did, but the fact that he was at the bottom of a deep shaft, and that there were no means of getting out other than the particular means which belonged to his employers and over which the plaintiff had contractual rights which at that moment were not in operation. He had no right to say to the defendants at that moment "You are preventing me from getting out of the mine." The defendants' reply would be, "We are not preventing you from getting out; get out by all means if you can. But you are not entitled to call upon us to take you out when contractually, as between you and us, we are not bound to do so. You are calling upon us to assist you in your breach of contract by taking you out. We are bound by contract to do so at a time, but not at this time." From that it follows, in my opinion, that there was no imprisonment of the plaintiff by the defendants. The passage from the judgment of Patteson J. in *Bird v. Jones* (1) cannot be read as if it said that if one man declines to give another man facilities for leaving a place which he desires to leave he imprisons him. He does not do so. He imprisons him if he prevents him from leaving; but he does not imprison him because he does not assist him to come out. The two propositions are perfectly different, the one from the other.

It will be seen from what I have said that there is in my view no occasion to say anything as to the other part of the argument, namely, as to whether the plaintiff had committed an offence, and, if he had, whether it was a statutory offence, and whether

(1) 7 Q. B. at p. 751.

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he was punishable by a penalty for what he had done. The defendants do not contend that they were entitled to imprison the plaintiff because he had committed an offence. The argument for the defendants at the trial was really addressed to the plaintiff's rights by way of contract. The defendants were, no doubt, saying, "We were not bound to wind the engine for you in these circumstances, because as between you and us you had no right to go to the surface. You ought to have been doing your work." The defendants did in that sense say that they were not going to assist the plaintiff to get out; but they never said that they were going to punish the plaintiff for an offence which according to their view he had committed. I will read two passages from the shorthand note of Mr. Mitchell Innes' argument at the trial which clearly shew the position taken up by the defendants. He said: "The company have always insisted that under that contract they were entitled to offer that man the cage at the end of that shift and at no other time. He went down there under an agreement to work for that length of time; that implies the further proposition that he was not entitled as of right to leave his work until the shift was at an end." Speaking for myself, it appears to me that that passage accurately states the position. It is perfectly correct to say that under the contract between the plaintiff and his employers he was not entitled to call upon them to use the cage for him till he had performed his work, or until some of the circumstances which I have mentioned had arisen. The other passage is as follows: "He went down to work for a shift, and until that shift is over he may not come up." Of course that means, as between the man and his employers, he may not come up. "There is nothing in the circumstances of this case, and the facts of this case, I respectfully submit, that can afford foundation for the proposition that he has shewn any title to ascend by the cage at any time during the shift, or that we have done anything which disentitles us to enforce that term of our contract which entitles us to refuse him the cage until he has performed his part of the contract and done his work for seven hours." Again, that is entirely upon his contractual rights. "He has shewn no title to ascend. He has shewn no right to

call, by way of specific performance if that were possible, upon the master to wind the cage for him because he is entitled to come up. He has done nothing which disentitles us to enforce that term of our contract which entitles us to refuse him the cage."

The question may be tested in another way. Suppose that at the end of the shift, when there would be a contractual right on the part of the man to come up, the master were to say that it was not convenient to bring the man up at that time and that he must remain in the pit for another hour, the man would be entitled to damages for breach of contract, but would there be any false imprisonment? In my opinion there would not. The master has not imprisoned the man. He has not enabled him to get out as under the contract he ought to have done, but he has done no act compelling him to remain there.

I only wish to add that if it were supposed that in the judgment which I have delivered I have affirmed in any degree any right on the part of the master to inflict by way of punishment upon the man for not doing his work the penalty that the man shall stay in an assigned place for an assigned time, I have wholly failed to convey my meaning. I mean nothing of the sort. The master has no right to compel the man, by way of penalty or punishment, to suffer an inconvenience by staying down a mine. That is not the question in this case. The question is whether the defendants falsely imprisoned the plaintiff. To my mind they did not imprison him, because they did not keep him there; they only abstained from giving him facilities for getting away.

I conclude by calling attention to the fact, which is really of the essence of the matter, that this is not an action in contract but in tort, and in tort the question is whether the defendants did anything to compel the plaintiff to remain in the mine, and whether they imprisoned him. In my opinion the defendants did not imprison the plaintiff; all that they did was to refrain from giving him a facility which in the circumstances they were not bound to give him.

For these reasons I am of opinion that this appeal succeeds.

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HAMILTON L.J. I propose to confine myself strictly to the issue and the facts in this case. That the action is one of tort has never been questioned by anybody in the course of the argument. It is brought by one man only, and we have nothing to do with the question whether the plaintiff might have been charged with the offence of breaking the Special Rules of the colliery under s. 51, sub-s. 3, of the Coal Mines Regulation Act, 1887, nor is it necessary to consider what happened to the other men in the colliery except in so far as it throws light on what happened to the plaintiff himself. I assume, as has been conceded throughout by the defendants, that the plaintiff, in refusing to do the work in question, acted in the course of a bona fide dispute as to the obligations of his service. On the other hand, I assume, what has been conceded by Mr. Tindal Atkinson as the basis of his argument (and necessarily so conceded because it is *res judicata inter partes*), that as between the plaintiff and his employers he did commit a breach of contract in refusing to do the work. I assume further that the following proposition, which is part of the judgment of Pickford J., is true: "I hold that it is not correct to say that, if miners go down for the purpose of working a shift and then decline to do so, even wrongfully, the mine-owner is entitled to detain them against their will in the mine until the end of the shift comes, although the cage may have been in the mine and going to the surface in circumstances in which the miner would have been entitled to use it." In other words, I assume that there is no ground whatever for a claim, if ever it was made, that an employer has the right to penalize a workman for breach of contract by detaining him in the contracted working place until the period has expired within which the work should have been done. It is doubtful whether anything approaching that argument can be said to have been advanced before Pickford J., although he seems to have been under the impression that the defendants' argument was intended to take that form. The interval which, owing to the exigencies of circuit business, took place between the hearing and the judgment may well account for some small misunderstanding of the intricate argument which had been addressed to

him. At any rate that contention has not been raised in this Court, and I cannot believe that any one with any knowledge of law would support that proposition.

The plaintiff has to prove that he was a sufferer by false imprisonment. The circumstances under which he is alleged to have suffered by this tort were not proved by evidence. The case was rested entirely on admissions, and it is essential that great care should be taken to ascertain exactly what were the admitted facts. I agree with Buckley L.J. as to the effect of the admissions. The plaintiff refused to perform the work allotted to him, and shortly after he had descended into the mine he went to the bottom of the shaft. It would have been a breach of the law if he had been taken up in the cage when coal was being carried in it, and the cage was not available for him until about 1 o'clock. There are no facts to shew, as appears to have been thought, that the lift was continuously running. Sect. 16, sub-s. 1 (c), of the Coal Mines Regulation Act, 1887, which provides that the apparatus "shall be constantly available for use," means, in my opinion, that it shall be capable of being used as necessity requires, not that it shall be continuously running so that if any man presents himself at any time he may immediately be raised to the surface or lowered to the bottom. At 1 o'clock the cage stopped raising coal, and that was the defendants' first opportunity for lawfully raising the plaintiff to the surface, without interfering with the regular business of the colliery, if they had so desired. But orders were given by the man in charge, one of the defendants, acting on the instructions of his superiors, that the plaintiff and others were not to enter the cage. Some men, but not the plaintiff, entered the cage. That shews conclusively, I think, that there was no attempt made to constrain the plaintiff by force, and that if he had chosen to do so he might have entered the lift with the others. It is quite clear that if he had done so he would have remained in the same position as before, and would have been restrained or detained exactly in the same sense and to the same extent as before. The bare statement of the man in charge that he had orders not to allow any one to enter the lift, since there was no show of force or threat of any

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kind, does not prove an imprisonment. The plaintiff did, however, in fact remain for twenty minutes at the bottom of the shaft contrary to his desires, and he remained there because in accordance with the orders of the defendants' manager the engine at the top did not wind up the cage, in which the plaintiff desired to be and in which some of the men were, for that space of time. That is what constitutes the imprisonment of the plaintiff, if anything does.

I accept the language of Coleridge J. in *Bird v. Jones* (1): "Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own." I say nothing as to how the case would have stood if force had been threatened to the plaintiff and he had been told to take a seat in some corner at the bottom of the shaft and had been reasonably led to suppose that legal or other force might be used to prevent his moving. The fact is that he remained at the bottom of the shaft simply because power was not turned on at the top of the shaft to raise the cage. Can that be held to have been an imprisonment? Doubtless Pickford J. thought and held that there was an imprisonment; but I think it is clear from his judgment that this analysis of the facts had not been brought to his mind when he delivered his judgment, and that he conceived that it was enough for him to pronounce upon the question whether detention in fact, the man being unable to get out, constituted under the circumstances an act of detention which required the defendants to justify the proposition which he thought had been advanced to him and which he quite rightly negatived. It is to be remembered that the plaintiff by going down the pit voluntarily put himself in the position in which he found himself at 1 o'clock when he was waiting to get into the cage, that is to say, he put himself in the position of being unable to get out of the pit unless he had the use of the cage and the winding apparatus. Any failure of the means of exit would

cause his actual and involuntary detention. He had provided for his return to the surface by his contract, because it is admitted that under it he was entitled to be raised to the surface free of expense by the defendants' apparatus at the end of the shift, and also during the shift if a case of urgent necessity such as the illness of himself or his family arose. I do not wish to be understood to suppose, and I do not decide, that a mere detention of twenty minutes would be of itself a breach of the implied term of the contract; but the provision which the plaintiff made for his return to the surface was a contractual provision, and if, contrary to the implied terms of the contract, his employers failed to give him the use of the lift, his remedy lay in damages for breach of contract and not in damages for a tort.

It appears to me, therefore, that the circumstance that the employers refused for twenty minutes to put the engine into operation and wind the cage, though it might possibly be a breach of contract, cannot in itself constitute the tort of false imprisonment. But that is all that happened. It is suggested that because the plaintiff under his contract was entitled to walk away, if he could have done so, without being restrained, therefore he was entitled, as he could not walk away, to call upon his employers to give him a passage in the lift at the first opportunity when it was available for passengers. I fail to understand how the plaintiff by breaking his contract can impose upon his employers some greater or other obligation than would have rested on them if he had performed his contract. If other circumstances had supervened, if he had been injured or anything of that kind had occurred, different considerations would arise; but how can it be said that merely by refusing to perform his contract he can make it the duty of his employers to do something which they were not otherwise by contract bound to do? Still less can I understand how, by breaking his contract, he can make it a tort on the part of his employers to fail to provide those appliances which they are only bound to find at all under the implied terms of a subsisting contract.

I am aware that the defendants have pleaded that they prevented the plaintiff from going to the surface and allege justification for doing so, but they allege that prevention, not

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as an admission of a false imprisonment which they had already denied, but as part of their contention that they were only exercising their contractual rights, or, it may be, were failing to perform their contractual duties (I care not which), and it is out of that alone that the detention in fact arose. If the defendants fail to perform their contract, doubtless the plaintiff is detained, but the remedy for that detention is in damages for breach of contract, and it cannot, merely because he is detained, be construed into the commission of a tort.

These considerations appear to me to be quite sufficient to shew that upon the admitted facts there was no material upon which a judgment in tort could be maintained. The fact is at most that both parties, I doubt not honestly, have mistaken their contractual rights. I refer to the case in the Privy Council of *Robinson v. Balmain New Ferry Co., Ltd.* (1), not because the facts are identical with those in the present case, but because it is a case which raised a very similar distinction between an actual detention arising out of a contract or the breach of it and tortious imprisonment. In that case distinctions were drawn in the judgment of Lord Loreburn analogous to those which arise and have to be taken in the present case. In my opinion, therefore, the judgment below must be set aside, and the appeal allowed and judgment entered for the defendants.

Appeal allowed.

Solicitors for plaintiff: *Hyman, Isaacs & Lewis, for Isaacs & Heath, Sunderland.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

(1) [1910] A. C. 295.

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June 30 ;
July 1.

Mine—Coal Mine—Minimum Wage—District Rules—Method of ascertaining Earnings of Miner — Validity — Certificate—Right to sue — Derbyshire (exclusive of South Derbyshire) District Rules—Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2), s. 1.

By rule 4 of the rules for the district of Derbyshire (exclusive of South Derbyshire), made under the provisions of the Coal Mines (Minimum Wage) Act, 1912, for the purpose of ascertaining what sum is due to a workman for any pay-week in respect of his right to wages at the minimum rate regard shall be had to the amount of his actual earnings during the period consisting of the pay-week in question and as few preceding pay-weeks as shall be necessary to make up a period during which the colliery has worked not less than ten full days, provided that the period shall in no case be longer than four pay-weeks in all. By rule 7, if any question shall arise whether any workman in the district is a workman to whom the minimum rate of wages is applicable, the question shall be decided (in the last resort) by the district board, and, failing a settlement by them, by the independent chairman, and a certificate of the decision shall be signed by the chairman and vice-chairman of the board or by the independent chairman, as the case may be, and such decision shall in every case be final and binding.

By reason of a strike of miners work at the defendants' colliery in the early part of 1912 ceased for about six weeks. On April 10 work was resumed, but for the pay-week ending on April 16 the colliery worked only one day, and for the pay-week ending on April 23 the colliery worked only five and a half days. The plaintiff, who was a miner employed at the colliery, claimed to be entitled to wages at the minimum rate settled under the Coal Mines (Minimum Wage) Act, 1912, for the pay-week ending on April 23. The defendants disputed his claim, and the question came before the district board and finally before the independent chairman, who gave a certificate that by reason of rule 4 the plaintiff was excluded from the operation of s. 1 of the Act, and was not a workman to whom the minimum rate of wages was applicable in respect of the pay-week in question. The plaintiff thereupon brought an action in the county court to recover the difference between the minimum rate of wages and the amount actually earned by him for that week :—

Held, that it was a condition precedent to the plaintiff's right to sue that he should have obtained a certificate that he was a workman to whom the minimum rate of wages was applicable; that rule 4 was not ultra vires; and that therefore the action was not maintainable.

Davies v. Glamorgan Coal Co., ante, p. 222, discussed.

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The plaintiff was a miner employed by the defendants at their colliery in the district of Derbyshire (exclusive of South Derbyshire) and he brought an action in the county court to recover 12s. 4d. alleged to be due to him under the Coal Mines (Minimum Wage) Act, 1912, for wages for the pay-week ending on April 23, 1912.

The plaintiff was employed as a miner at Morton Colliery, No. 6 pit, belonging to the defendants. Owing to the national coal strike in the early part of 1912 no work was done in the colliery from February 27 until April 10, 1912. The coal strike ended on April 10, 1912, when the plaintiff with the other miners returned to work, but owing to a strike of banksmen the colliery only worked for one day during the pay-week ending on April 16, namely, on April 10. During the pay-week in question, namely, the week ending April 23, the colliery only worked four full days and two three-quarter days, equivalent to five and a half days in all.

The plaintiff claimed to be paid for the pay-week ending April 23, 1912, the minimum rate of wages settled under the Act (1), namely, 1l. 11s. 8d., whereas the defendants contended that he was only entitled to be paid 19s. 4d., the amount actually earned by him during that week, which sum they had already paid to him. The plaintiff thereupon, under the district rules (2), submitted the question as to his right to be paid the minimum rate of wages to the joint district board, which was formed under the Coal Mines (Minimum Wage) Act, 1912, for the district of Derbyshire (exclusive of South Derbyshire) and duly recognized by the Board of Trade. The board were unable to agree, and the question came before the independent chairman appointed under the rules. Upon November 14, 1912, the independent chairman wrote the following letter to the joint secretaries of the Derbyshire Minimum Wage Board:—"Dear Sirs,—I have very carefully considered the views of the employers and workmen placed before me as independent chairman at a meeting of the joint district board at Chesterfield on the 12th inst. under district rule No. 7 with reference to the claims of certain workmen at No. 6 pit of the Clay Cross Company to be paid the

(1) See note 1, p. 806, post.

(2) See note 2, p. 807, post.

appropriate minimum wage for the week April 17th—24th, and find that in my opinion on the strict construction of district rule No. 4 the pit not having worked more than one full day within a period of four weeks preceding April 17th—and the reason for its not having worked does not appear material—the conditions precedent to calculating the amount of the minimum wage for the week April 17th—24th are non-existent, and it therefore follows that the workmen cannot claim to be paid the minimum wage in respect of such week.

“If a certificate is required, kindly furnish me with the name of at any rate one of the claimants, as I take it a certificate should be given in a concrete case, and the one case will govern the whole.”

Upon the same day the independent chairman gave the following certificate:—

“Coal Mines (Minimum Wage) Act, 1912.

“District of Derbyshire.

“Certificate of settlement of dispute by agreement.

“It is hereby certified by the undersigned representing the employer and workman respectively that after consideration of the question referred to them under district rule 7 they decided by agreement that James Randle”—the plaintiff—“a workman employed at No. 6 pit of the Clay Cross Company (a) is a person excluded under the district rules from the operation of section 1 of the above-named Act, and is not a workman to whom the minimum rate of wages is applicable in respect of the pay-week ending April 23, 1912.”

The plaintiff subsequently brought this action in the county court to recover 12s. 4d., the difference between the minimum rate of wages, 1l. 11s. 8d., and the sum of 19s. 4d., the amount actually earned by him. The defendants gave notice that they intended to rely upon the following ground of defence, namely, that the Court had no jurisdiction in the subject-matter of the action, and this was the only question raised at the hearing. It was contended on their behalf that no proceeding could be taken to recover a minimum wage fixed under the Coal Mines (Minimum Wage) Act, 1912, and rules at any rate until the tribunal

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provided by them had decided and certified that the workman claiming such wages was one to whom the minimum rate was applicable; and further that a decision adverse to the plaintiff on this point had been duly given and certified, and that on that ground also the Court had no jurisdiction, and that the certificate was itself conclusive evidence of the decision.

The county court judge overruled the objection to the jurisdiction and refused to give judgment for the defendants upon that ground. The defendants by leave appealed.

J. Sankey, K.C. (E. W. Cave with him), for the defendants. The decision of the county court judge was wrong upon two grounds. First, he had no jurisdiction to try the case, because exclusive jurisdiction is conferred by the Coal Mines (Minimum Wage) Act, 1912, and the district rules made under that Act, upon the independent chairman of the district board; and, secondly, the independent chairman had in fact heard this case and given his decision against the plaintiff, and that decision is, under rule 7, final and binding. It is clear from provisions of that rule that the question whether a workman is or is not entitled to the minimum wage must be decided ultimately by the independent chairman, and that his certificate is final and conclusive. It may be that, if the chairman has certified that a workman is entitled to a certain sum in respect of minimum wage, the workman can sue upon that certificate; but in no other case can he bring an action to recover the minimum wage. Assuming that the certificate given by the chairman in the present case was given upon wrong grounds or was wrong in form, that is quite immaterial; it cannot enable the workman to sue instead of proceeding according to the rules. The workman can never recover any sum in respect of minimum wage unless, in the last resort, he has obtained a certificate of the chairman in his favour, and then only for the sum which is certified to be due to him.

F. A. Greer, K.C. (E. B. Charles with him), for the plaintiff. Sect. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, modifies the contract of employment of a workman in such a manner as to entitle the workman to a minimum wage at the

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rate settled under the Act, unless it is certified in manner provided by the district rules (a) that the workman is a person excluded under the rules from the operation of that provision, or (b) that the workman has forfeited his right to wages at the minimum rate by reason of his failure to comply with the conditions as to the regularity or efficiency of the work laid down by the rules. No question arises as to forfeiture of his right to wages at the minimum rate under the second branch of the exception. The only question is whether the plaintiff is "excluded" under the rules from the operation of sub-s. 1. The only provision in the Act authorizing district rules to be made excluding workmen from the right to wages at the minimum rate is that contained in s. 1, sub-s. 2, namely, the exclusion of aged and infirm workmen. There is no other provision in the Act giving power to make rules as to the exclusion of workmen from its provisions. Inasmuch as the Act has not laid down any special mode of recovering the minimum wage, it is open to the workman to sue for it in the ordinary tribunal, namely, the county court. There is nothing in the Act which makes a certificate of the district board or of the independent chairman a condition precedent to the maintenance of the action. The certificate is one of exclusion, and if the employer produces a certificate that the workman is excluded within the meaning of the Act it is an answer to the action. The only conditions precedent to the maintenance of the action are that the minimum wage shall have been settled under the Act, and that the plaintiff is a workman within the meaning of the Act. There is no provision in the Act depriving a workman of his right to a minimum wage because he has not worked a certain number of days, and no power is given to make rules having that effect. If rule 4 of the district rules means that the workman must have worked ten days before he is entitled to a minimum wage it is ultra vires within the decision of Pickford J. in *Davies v. Glamorgan Coal Co.* (1) It is for the county court judge to say how the actual wage earned which was to be compared with the minimum wage should be ascertained. In the above case Pickford J. decided that regard ought to be had to the pay-week.

(1) Since reported, ante, p. 222.

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The independent chairman had no power to decide that the plaintiff was excluded from the operation of the Act because he had not worked the number of days required by rule 4. If such a certificate were valid the result would be that a workman would never be entitled to a minimum wage for the first week of his working in the colliery. Rule 4 is ultra vires and the certificate does not affect the plaintiff's right to recover the minimum wage. The decision of the county court judge was therefore right.

J. Sankey, K.C., in reply. There is no question here of the exclusion of a workman who would otherwise come within the Act. The question is whether the plaintiff is a workman to whom the minimum rate of wages is applicable within s. 1, sub-s. 2, and by rule 7 the decision of the chairman upon that question is final.

RIDLEY J. We have come to the conclusion that the decision of the county court judge was wrong. The question arises under the Coal Mines (Minimum Wage) Act, 1912. Sect. 1, sub-s. 1, of the Act gives a right to every "workman" as defined in s. 5, namely, to every workman employed in a coal mine below ground, other than certain excepted persons, to be paid what is called in the title of the Act a minimum wage. "Minimum wage" is a short expression for "wages at not less than the minimum rate settled under this Act and applicable to that workman." The workman is entitled to that minimum wage "unless," as sub-s. 1 proceeds to say, "it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules."

Sub-s. 2 provides that "the district rules shall lay down conditions . . . with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen," and also with respect to the regularity and efficiency of the work and to the time for which a workman is to be paid in the event of any interruption of work due to an emergency.

The district rules are also to make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of the section. Therefore the scheme of the Act is that there is to be a wage at not less than the minimum rate settled under the Act by the joint district board. Under those powers district rules were made for the district in question—Derbyshire (exclusive of South Derbyshire)—of which rule 4 is one. It is not a rule under s. 1 of the Act excluding workmen from the operation of its provisions. That is not its object. It does not say that the workman is not to have the benefits of the Act because he has failed to comply with certain conditions. It is not an excluding rule. Its object is this. A minimum rate of wages has to be settled under the Act, and then the workman has a right to be paid wages at not less than that minimum rate. There are two sets of figures to be compared, the sum actually earned by the workman and the minimum rate settled under the Act. Naturally it is impossible to take the workman's earnings for each single day and compare that with the minimum rate. It would be unfair to make the calculation in such a way. The wage which the workman is earning is to be calculated over such a period of time as will make a fair comparison with the minimum rate, and therefore it was necessary for the district board, which had to make the rules, to state how this sum should be arrived at so as to admit of such comparison. Rule 4 does that. That rule provides that the period during which the actual earnings shall be calculated shall be the pay-week in question and as few preceding pay-weeks as shall be necessary to make up a period during which the colliery has worked not less than ten full days, provided that the period shall in no case be longer than four pay-weeks in all. That is the taking of ten full days provided that they must all come within four weeks. That, to my mind, is not an

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unreasonable provision. A period is taken in which the rate of pay remains about the same.

It is contended that there is no power to make such a rule and that therefore it is ultra vires. It is said that Pickford J. has held in *Davies v. Glamorgan Coal Co.* (1) that a rule of the South Wales District Rules under the Coal Mines (Minimum Wage) Act, 1912, providing for an average of the workman's wages over two successive weeks is ultra vires. I have not seen that case, but at present I can see no ground for saying that to fix such a period as ten full days as the period over which the average is to be calculated would be ultra vires. It seems to me to be necessary for the district board, which has to make the rules, to use its discretion in specifying what particular number of days should be taken. The result may be that a workman, who is otherwise entitled to receive a minimum wage, may be incidentally excluded because he is unable to shew that he has worked the requisite number of days; but that is not a rule excluding him. It happens that it does exclude him because he cannot comply with the regulation necessary to entitle him to prove his claim. I cannot think that there is anything in the Act which makes the rule ultra vires because it incidentally has that effect in such a case as the present. It seems to me that it is a case in which the workman is excluded, not in the sense in which exclusion is spoken of in s. 1 of the Act, but because he is a workman to whom the minimum rate of wages is not applicable until he has worked for a certain period.

That being so, the Act, in my opinion, provides that he must produce a certificate shewing that he is entitled to a certain sum of money before he can sue for it in the county court. He may recover the amount from his employer after the rate is settled, that is to say, the rate which applies to him. He must first, however, get a certificate that he is entitled to that sum. What is the effect of the certificate in this case? We must take the two documents together and construe them fairly. The effect is that the plaintiff is excluded in this sense, namely, because he is not a workman to whom the minimum rate of wages is applicable under rule 4. As I have said, I am not prepared to say that

(1) Since reported, ante, p. 222.

the rule is ultra vires, and I do not see how without some such rule the Act could be brought into operation. The plaintiff makes a claim against his employers, and when the certificate is produced it appears from it that he is not entitled to the sum claimed. I do not myself see any answer to that position.

The county court judge upon this point said: "It was argued that no proceeding can be taken in this Court to recover a minimum wage fixed under the Act and rules at any rate until the tribunal provided by them has decided and certified that the workman claiming such wage is one to whom the minimum rate is applicable. It was also contended that a decision adverse to the workman on this point had been duly given and certified, and that on that ground also this Court had no jurisdiction." In my opinion those contentions are right. I think that it is correct to say that no proceeding can be taken in the county court to recover the sum alleged to be due unless it is certified in accordance with the decision of the tribunal which has to administer the rules. In this case a decision adverse to the workman had been duly given and certified upon the ground that he was not a person to whom the minimum rate of wages was applicable. In these circumstances I think that the decision of the county court judge was wrong. It seems to me that it is a case in which the action cannot be maintained because the plaintiff has failed to shew that he is entitled by the decision and the certificate of the tribunal under the Act to recover the sum claimed.

For these reasons I think that the appeal must be allowed and judgment entered for the defendants.

LORD COLERIDGE J. We have to decide as to the legal correctness of a certificate dated November 14, 1912, and signed by the independent chairman of the district board appointed under the provisions of the Coal Mines (Minimum Wage) Act, 1912, that the plaintiff is a person excluded under the district rules from the operation of s. 1 of the Act and that he is not a workman to whom the minimum rate of wages is applicable in respect of the week in question. Sect. 1 of the Act provides that it shall be an implied term of every contract for the employment

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of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under the Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate on what I may call personal grounds. By s. 2, sub-s. 1, minimum rates of wages and district rules for the purposes of the Act are to be settled separately for each district by a body of persons recognized by the Board of Trade as the joint district board for that district. The joint district board was appointed, and made certain rules under the provisions of the Act. There had been a strike, and the plaintiff applied in the early days of his re-employment to the district board to settle the question under the provisions of the Act whether or not he was entitled to a minimum wage. These boards are very carefully constituted. They are made fully representative; an equal number of members represent the masters and the men respectively so as to insure impartiality as far as possible, and in case of difference an independent chairman is appointed who is to decide all matters of difference. The plaintiff went before the board, and finally before the independent chairman, who gave the certificate in question. That certificate is obviously based upon the view that rule 4 of the district rules is a rule to which he was entitled and indeed compelled to have recourse in order to arrive at his decision. That rule provides for the mode in which the sum due to a workman in respect of his right to wages at the minimum rate shall be ascertained, and it contemplates a period of not less than ten full days as the period which alone when it is looked at shall entitle the workman to the benefit of the provisions of the Act. Now it is clear that rule 4 is not in form a rule excluding the workman from the right to wages at the minimum rate in the sense in which the word "exclusion" is used in s. 1, sub-s. 2, of the Act. It is a rule which deals with the ascertainment and payment to the workman of the amount of the minimum wage under s. 1 of the Act, and as s. 1, sub-s. 1, provides that the employer shall pay to the

workman wages at not less than the minimum rate "settled under this Act," the independent chairman considered that he was bound by that rule. It is clear that if he was bound by it his decision is right, because under that rule the plaintiff had not worked a sufficient number of days in order to enable the minimum wage due to him to be ascertained. It is said, however, that the rule is ultra vires, and that the decision of Pickford J. in *Davies v. Glamorgan Coal Co.* (1) is in point. I understand that Pickford J. under other conditions in another district limited the period to the pay-week. I doubt if that is a decision to the effect that the rules cannot make any such provision at all, and in order to satisfy ourselves that this rule is ultra vires, we ought to have materials before us which we have not got; we should have to consider the circumstances of the particular mine, and enter upon an inquiry which is not open to us now. Therefore, as there is nothing in principle which vitiates the applicability of rule 4, I must consider the rule for the purposes of this case to be intra vires. That being so, it is a rule which is binding upon the independent chairman, and if the matter referred to him was one which was properly referred to him, it was a matter which could only be referred to and decided by him according to the provisions of the Act. The certificate is quite clear. It is true that it uses the word "excluded," and the use of that word may have led to a good deal of this discussion, because "exclude" is used in a very limited sense in some portions of the Act; but he gives in the certificate the ground for the exclusion, namely, that the plaintiff is not a workman to whom the minimum rate of wages is applicable, and that follows the exact language of district rule 7, which provides that "if any question shall arise (a) whether any workman in the district is a workman to whom the minimum rate of wages is applicable" the question shall be referred, in the last resort, to the district board, and failing a settlement by the board the independent chairman shall be called in, and he is to decide and give a certificate. Therefore it is one of those very matters which the Act provides shall be settled in this particular way.

That is the very careful scheme of the Act, providing this

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very special remedy. In the case of this special remedy it is not open to the workman to sue in the county court as if that remedy had not been provided. The workman can, if he obtains a certificate, sue the employer. The employer can, if he obtains a certificate in his favour, meet any claim under the Act with that certificate. That is what is meant by s. 1, sub-s. 3, of the Act, which provides for the recovery by the workman of wages at the rate after it has been so settled. In these circumstances it seems to me that the certificate, though perhaps not correct in form, is in substance correct. It has been explained by a contemporaneous letter, and it seems to me that in those circumstances there is no ground whatever for saying that the independent chairman exceeded his jurisdiction, or that it was open to the county court judge to review his decision.

Appeal allowed.

Solicitors for plaintiff: *King, Wigg & Brightman, for Bertram Mather, Chesterfield.*

Solicitors for defendants: *Ullithorne, Currey & Co., for C. F. Elliot Smith, Mansfield.*

NOTE 1. 2 Geo. 5, c. 2, s. 1: “(1.) It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.

“For the purposes of this Act the expression ‘district rules’ means rules made under the powers given by this Act by the joint district board.

“(2.) The district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to wages at the minimum rate of aged workmen and infirm workmen (including workmen partially disabled by illness or accident), and shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity

and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

"The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section.

"(3.) The provisions of this section as to payment of wages at a minimum rate shall operate as from the date of the passing of this Act, although a minimum rate of wages may not have been settled, and any sum which would have been payable under this section to a workman on account of wages if a minimum rate had been settled may be recovered by the workman from his employer at any time after the rate is settled."

Sect. 2: "(1.) Minimum rates of wages and district rules for the purposes of this Act shall be settled separately for each of the districts named in the schedule to this Act by a body of persons recognised by the Board of Trade as the joint district board for that district."

One of the districts named in the schedule to the Act was "Derbyshire (exclusive of South Derbyshire)."

Sect. 5: "(1.) In this Act . . . the expression 'workman' means any person employed in a coal mine below ground other than " certain classes of persons not material to this case.

NOTE 2. Rule 4 of the district rules made by the joint district board: "For the purpose of ascertaining what sum (if any) is due to a workman for any pay-week in respect of his right to wages at a minimum rate, regard shall be had to the amount of his actual earnings during the period herein-after mentioned, and all sums (if any) received by him in respect of his right to wages at a minimum rate for any previous pay-week forming part of that period, and to the amount of wages he would have earned in the time he has worked during that period at the minimum rate applicable to him. If the former amount is less than the latter, he shall be entitled to the difference between the two in addition to his actual earnings during that pay-week.

"Provided always that in case of a workman who during such period has worked partly on tonnage or piece-work rate and partly on day-wage rate, his earnings on the day-wage rate and the time he has worked on that rate shall be disregarded.

"The period above referred to shall, subject to the exception hereinafter contained, consist of the pay-week in question and as few preceding pay-weeks as shall be necessary to make up a period during which the colliery has worked not less than ten full days, provided nevertheless that the period shall in no case be longer than four pay-weeks in all.

"In reckoning such full days, two half-days shall be counted as one full day, and so with regard to other parts of a day . . ."

Rule 5: "Every workman shall be excluded from the right to wages at

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the minimum rate who is over sixty-five years of age or who is partially incapacitated by infirmity or partially disabled by illness or accident."

Rule 6 specifies certain conditions as to the work with which a workman shall comply, and if during the period which has to be taken into account under the rules when ascertaining what sum (if any) is due to him for any pay-week in respect of his right to wages at the minimum rate he fails to comply with such conditions as are applicable to him, he shall forfeit all right to wages at the minimum rate for that pay-week, except where the failure to comply is due to a cause over which he has no control.

Rule 7: "If any question shall arise:—

"(a) whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or

"(b) whether a workman has complied with the conditions laid down by these rules, or

"(c) whether a workman who has not complied with such conditions has forfeited his right to wages at the minimum rate,

"such question shall be decided by a colliery official and the workman, the checkweigher being present if desired by either party.

"Failing agreement by them, the question shall be decided by the management of the pit and the workman or by the management of the pit and the agent of the miners' association for the district.

"Failing agreement by them, the question shall be submitted to a board consisting of not less than three and not more than seven representatives of the employers and an equal number of representatives of the workmen. The board shall elect a chairman and a vice-chairman, and shall also have power to select an independent chairman from a panel of persons agreed upon by both sides of the board. If the board fail to agree upon the independent chairman he shall be selected by lot from such panel.

"The board shall endeavour to settle the question without calling upon the independent chairman for his services or his presence . . .

"Failing a settlement by the board, the independent chairman shall be called in, and he shall have power to decide the question by giving his casting vote or in such other manner as he may think right.

"The decision of the board or the independent chairman, as the case may be, shall in every case be final and binding.

"If the question is settled by agreement a certificate to that effect shall be drawn up and signed by the parties to the agreement and given to both or either of the parties when requested.

"If the question is settled by the board, or by the independent chairman, a certificate of the decision shall be drawn up and given to both or either of the parties when requested. Such certificate shall be signed by the chairman and vice-chairman of the board if the independent chairman is not called in, or by the independent chairman if he is called in.

"Any such certificate shall be conclusive evidence of the agreement or decision arrived at."

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

LUMSDEN v. COMMISSIONERS OF INLAND REVENUE.

1913

June 25;

July 31.

Revenue—Increment Value Duty—Sale of Fee Simple—Mode of Calculation—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), ss. 1, 2, 25.

In order to ascertain the site value of land for the purposes of increment value duty on the occasion of a sale the value of the consideration for the transfer must in accordance with s. 2, sub-s. 2, of the Finance (1909-10) Act, 1910, be taken as the basis of the calculation, and from that must be made the like deductions as are directed by s. 25, sub-s. 4, of the same Act.

So held by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Swinfen Eady L.J. dissenting).

In 1910 the appellant sold the fee simple of a house, subject to tithe of the capital value of 33*l.*, for 750*l.* At the time of the sale the "gross value," that is, the amount which the fee simple of the property if sold in the open market by a willing seller in its then condition free from any charge or burden might have been expected to realize, was 658*l.* On April 30, 1909, and at the date of the sale, the "full site value" was the same, namely, 228*l.* The original "assessable site value" was 105*l.* A deduction of 90*l.* was allowable for expenditure on the land.

An assessment of 25*l.* gross increment value duty, under ss. 1 and 2 of the Finance (1909-10) Act, 1910, upon a sum of 125*l.* gross increment value, was made upon the appellant. On appeal, the referee held that no increment value duty was payable, but this decision was reversed by Horridge J.

Held by the Court of Appeal (Cozens-Hardy M.R. and Kennedy L.J., Swinfen Eady L.J. dissenting), that the proper method of calculating the increment value under the Act was to deduct 430*l.*, the difference between the 228*l.* full site value and the 658*l.* gross value, and also the allowance of 90*l.*, from the purchase price of 750*l.*, leaving 230*l.* or an excess of 125*l.* over the original site value of 105*l.*; and that, therefore, increment value duty was payable on the sum of 125*l.*

Decision of Horridge J. [1913] 1 K. B. 346, affirmed.

Herbert's Trustees v. Inland Revenue (1913) 50 S. L. R. 569, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326, discussed.

APPEAL from the judgment of Horridge J. upon a special case stated by a referee under the Finance (1909-10) Act, 1910, in a matter of increment value duty. (1)

The appellant, Lumsden, was assessed to increment value duty

(1) [1913] 1 K. B. 346.

C. A. under ss. 1 and 2 (1) of the Finance (1909-10) Act, 1910, in
1913 respect of a house and shop, and a gross duty of 25*l.* was charged
in respect of an alleged gross increment value of 125*l.*, and he
appealed against the assessment.

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The referee by whom the appeal was heard stated his decision and award in the form of a special case for the opinion of the Court. The material paragraphs of the case were as follows:—

3. The occasion on which the duty was alleged to become payable was the sale on August 23, 1910, by the appellant of the fee simple of the said dwelling-house and shop to a buyer, who took possession for the purpose of carrying on a business in the shop. The sale was of the property subject to the burden of tithe, which tithe is referred to in the said provisional valuation of the capital value or burden of 33*l.*

4. On February 9, 1911, the said dwelling-house and shop (hereinafter called "the property") were provisionally valued under the Act as at April 30, 1909, and this valuation was accepted by the appellant raising no objection within the time prescribed by the Act. The original assessable site value was fixed at 105*l.*

5. The consideration for the transfer on sale on the occasion giving rise to the claim was 750*l.*

6. At the time of the sale the fee simple of the property if sold in the open market by a willing seller in its then condition free from incumbrances and from any burden, charge, or restriction, other than rates and taxes, might have been expected to realize the sum of 658*l.*

7. It was admitted that there had been no variation in the full site value between April 30, 1909, and August 23, 1910, and that the value was 228*l.* on each date. It was also admitted that 90*l.* represented the deduction for roads to be made under s. 25, sub-s. 4 (b), from the total value to arrive at the assessable site value. The capital value of the tithe was admitted to be 33*l.*

8. It was contended on behalf of the appellant that:—The increment value is either, (A) the difference between the original assessable site value of 105*l.* (fixed by the said provisional valuation)

(1) See note on p. 833, post.

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tion) and the assessable site value on the occasion of the sale, which is in the present case to be taken to be the value of the consideration for the transfer on the sale to Mrs. Stobie subject to the like deductions as are made under the general provisions of Part I. of the Act as to valuation for the purpose of arriving at the site value of the land from the total value, or (B) the difference between the original full site value of 228*l.* and the admitted full site value of 228*l.* on the present occasion when the increment value is to be collected. In order, therefore, to arrive at the result here on the footing of (A) the following considerations must be applied:—

(1.) The fee simple was sold subject to tithe of 33*l.* capital value for 750*l.*, therefore the gross value (which in this case is the fee simple value free from tithe—see s. 25, sub-s. 1) is 783*l.*

(2.) It is admitted the full site value at the time of sale was 228*l.*, the same as in the provisional valuation.

(3.) Therefore the difference between gross value and the full site value was 555*l.*

(4.) The sale price gives the total value, namely, 750*l.*, for that was the price subject to tithe.

(5.) Therefore the “assessable site value” is the total value (750*l.*) after deducting (A) the deduction of 555*l.* and (B) 90*l.* attributable to roads.

(6.) The “assessable site value” for calculating the increment duty is 105*l.*, i.e., after deduction from 750*l.*—(555*l.* + 90*l.*), i.e., 645*l.*

(7.) There is therefore no increment value.

It was contended on behalf of the Commissioners of Inland Revenue:—

1. That under s. 2, sub-s. 1, of the Act the increment value is to be deemed the amount, if any, by which the site value of the land on the occasion, ascertained in accordance with the said section, exceeds the original site value of the land as ascertained in accordance with the general provisions of the First Part of the Act.

2. That the site value of the land on the occasion was in this case the value of the consideration, i.e., 750*l.*, subject to the like

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deductions as are made under s. 25, sub-s. 4, to arrive at site value of land from total value.

3. That the first deduction to be made under and by virtue of s. 25, sub-s. 4. (a), read with s. 25, sub-s. 2, of the Act, is the difference mentioned in s. 25, sub-s. 2, i.e., the difference between the gross value and value divested.

4. That the gross value of the land being as found by the referee 658*l.*, the value of the site divested being also as found by him 228*l.*, the difference amounted to 430*l.*

5. That there being no other deduction except the deduction for roads, which is found by the referee at 90*l.*, the total amount of the deduction is 520*l.*

6. That deducting the 520*l.* from the value of the consideration, namely, 750*l.*, the result is 230*l.*

7. That this 230*l.* is the site value of the land on the occasion, arrived at in accordance with the provisions of the Act.

8. The increment value duty is exigible on the difference between 230*l.*, the site value on the occasion, and 105*l.*, the original site value of the land as found in the provisional valuation.

The referee decided that the contention of the appellant was correct, and accordingly that he was not liable to pay any increment value duty on the occasion in question.

If the Court should be of opinion that the contention of the Inland Revenue Commissioners was correct, the appellant was liable to pay the increment value duty claimed by the Commissioners.

Horridge J. reversed the decision of the referee. He held that the contention of the Crown was correct, and that the proper method of calculating the increment value under the Act was to deduct 430*l.*, the difference between the full site value and the gross value, and the allowance of 90*l.* from the purchase price of 750*l.*, leaving 230*l.*, or an excess of 125*l.* over the original site value of 105*l.*; and that, therefore, increment value duty was payable on the sum of 125*l.*

Lumsden appealed.

Danckwerts, K.C., and *W. Allen*, for the appellant. The question to be decided in this case is how increment value of

land is to be arrived at. The values created by the Act are purely artificial. The main duty imposed by the Act is increment value duty, which is a duty of 20 per cent. on the increase of the site value of land. The idea underlying the provisions of the Act is that if the value of the land cleared of the buildings upon it has increased it is to be taxed. The object of the Act is to intercept part of that increase of value for the benefit of the State in so far as that increase is not due to the expenditure of the owner on the land. The occasions on which increment value duty is collected are (a) on a sale or lease of land or an interest in land, (b) on the death of the owner, and (c) in the case of a corporation which never dies, on periodical occasions: s. 2. The Act defines "fee simple" as "the fee simple in possession not subject to any lease": s. 41. Agricultural land is exempted from increment value duty: s. 7. By s. 26 the Commissioners are required to cause a valuation to be made of all land in the United Kingdom, shewing separately the total value and the site value respectively of the land. By s. 27 the Commissioners are to cause a copy of their provisional valuation of any land to be served on the owner of the land. [They referred to the definitions of "gross value," "full site value," "total value," and "assessable site value" in s. 25.]

It is submitted that the proper method of calculating the increment value under the Act is to take the difference between the original assessable site value and the assessable site value on the occasion of the sale, that is, the purchase price, and from that to make the like deductions as are made under the general provisions of Part I. of the Act as to valuation for the purpose of arriving at the site value of the land from the total value. Alternatively, it is submitted that the difference should be taken between the original full site value and the full site value on the occasion of the sale. According to the former alternative the site value is to be ascertained from the actual sale transaction on August 23, 1910. Under s. 26 the total value was provisionally fixed at 625*l*. The original assessable site value was fixed at 105*l*. The capital value of the tithe rent-charge is 33*l*. The deduction for roads under s. 25, sub-s. 4, is agreed to be 90*l*. It is agreed that the full site value according to the original

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valuation and on the occasion of the sale on August 23, 1910, was the same, namely, 228*l*. The appellant contends that the difference between the gross value and the full site value is 555*l*. To arrive at the assessable value on the occasion the appellant takes the total value, 750*l*., and deducts therefrom under s. 25, sub-s. 4, the 555*l*., the difference between the gross value and the full site value, and 90*l*. for roads, and so obtains the assessable site value 105*l*., which is the same amount as on the previous occasion. There is therefore no increment value. According to the other alternative, the full site value on April 30, 1909, and on the occasion of the sale on August 23, 1910, being the same, there is again no increment value. According to this alternative that site value means full site value; for s. 3, sub-s. 5, and s. 2, sub-s. 1, both relate to the occasion of the collection of increment value duty, and "site value" in s. 3, sub-s. 5, means "full site value." See per Lord Moulton in *Herbert's Trustees v. Inland Revenue*. (1)

The whole contest between the appellant and the respondents is as to whether or not the consideration to be paid on the transfer is to be taken as the total value. The Crown contends that it is not: the appellant contends that it is. The argument for the appellant was in effect put by Lords Shaw and Moulton in *Herbert's Trustees v. Inland Revenue*. (2) Sect. 2, sub-s. 3, substituted site value based upon the purchase price, where there is a value evidenced by an actual sale within the specified antecedent period; and the rule that applies to substituted site value is to be taken on a sale after the passing of the Act. In other words, the actual purchase price is the basis on which the deductions under the Act are to be made. Wherever the real value has been ascertained by a sale the starting point is that value and not the value guessed at under s. 25.

Sir John Simon, S.-G., and *W. Finlay*, for the Crown. The contention of the appellant disregards the findings in the special case and the language of the statute. Compare para-

(1) 50 S. L. R. 569, 582, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326.

(2) 50 S. L. R. 569, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326.

graph 6 of the case with s. 25, sub-s. 1, of the Act. It is necessary to take into consideration the fact that the gross value on the occasion was 658*l.* The argument on behalf of the appellant proceeds on the basis that the gross value was 783*l.* and not 658*l.* as stated by paragraph 6 of the case.

[*Danckwerts, K.C.* My argument is that the valuation of 658*l.* ought not to have been made.]

The argument of the appellant based on this difference is a fallacy. It is a confusion of thought to say that because a certain sum was paid on a certain occasion that is the sum which the property might be expected to realize. Paragraph 6 of the case states that the sum which the property might be expected to realize if sold in the open market is 658*l.*

The view contended for by the Crown as illustrated by figures is as follows:

On April 30, 1909.	On August 23, 1910.
<div>£</div>	<div>£</div>
Gross value . . . 658	658
Full site value . . . 228	228
Amount deducted	
from gross to arrive	430
at full site value .	
Total value . . . 625	Consideration 750
Assessable site value . 625	Site value on
— (430 + 90)	occasion = 750
= 105	— (430 + 90)
	= 230

The increment value is therefore the difference between 230*l.* and 105*l.*, namely 125*l.*

It does not follow that the amount of the deduction of full site value from gross value will be the same on April 30, 1909, as on the occasion. The question is what ought to be deducted from 750*l.* 430*l.* is the amount you have to deduct from the gross value to arrive at the full site value. The gross value depends on what you might expect to get on a purchase, not on the amount of the consideration paid on a particular occasion. The last paragraph of s. 25 provides that “Any reference in this Act

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to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section." Accordingly "assessable site value" in s. 25, sub-s. 4, includes the original site value; and "site value" means assessable site value except when you are speaking of site value on an occasion. Sect. 3, sub-s. 5, which has been relied on, merely provides a rough and ready way of dealing with the matter. The idea is to give the subject a certain amount of margin before taxing the increment. It is curious that the margin given should be measured by a percentage. It might be better if some fixed figure were given. No form of construction will get over the difficulty that 10 per cent. of nothing is nothing. The plain intention of the sub-section is to make a concession to the subject. The key to the sub-section is that it is a sub-section authorizing a reduction.

[*Danckwerts, K.C.*, referred to the definition of "original site value" in s. 27, sub-s. 1.]

In any case the Court has not here to construe s. 3, sub-s. 5, but to construe s. 2 together with s. 25.

As to the second branch of the argument for the appellant, it is submitted that when s. 2, sub-s. 2, speaks of deductions for arriving at site value from total value it means assessable site value as defined in s. 25, sub-s. 4. The judgment of Horridge J. was right and ought to be affirmed.

Danckwerts, K.C., in reply. The Solicitor-General's argument comes to this, that every ambiguity in the Act is to be construed in favour of the Crown. The views of Lord Shaw and Lord Moulton in *Herbert's Trustees v. Inland Revenue* (1) cannot be regarded as mere obiter dicta. They both thought it necessary to deal with the argument derived from s. 3, sub-s. 5, and get over it. They held that for the purpose of the collection of increment value duty site value meant full site value. In the present case the full site value has not increased. It is agreed that it was the same "on the occasion" as on April 30, 1909, and it is therefore impossible that there should be any increment. This entirely

(1) 50 S. L. R. 569, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326.

destroys the Solicitor-General's argument. All the Court is asked to do is to restore the valuation of the referee.

The total value is the price at which the property would sell in the open market as it stands subject to all its liabilities. Sect. 2 says you must start with that value as the basis.

Cur. adv. vult.

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July 31. The following written judgments were delivered:—

COZENS-HARDY M.R. This appeal raises an important question as to the mode in which "increment value" is to be ascertained on the occasion of a sale of the fee simple in possession. It involves the consideration of several terms used in s. 25 of the Finance (1909-10) Act, 1910, namely, "gross value," "full site value," "total value," and "assessable site value," and perhaps also of "original site value." "Gross value" is defined in sub-s. 1: "For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise." There is not much obscurity in this language. "Full site value" is defined in sub-s. 2. Speaking generally, it is the value of the bare land apart from any buildings or trees thereon. "Total value" is defined in sub-s. 3. Speaking generally, it is the gross value reduced by any fixed charges or restrictive covenants or easements. "Assessable site value" is defined in sub-s. 4. Speaking generally, it is the "total value" less the like deductions as are directed to be made from "gross value" to arrive at "full site value," and less also certain special allowances which are more or less in the discretion of the Commissioners. "Original site value" is ascertained as directed by ss. 26 and 27. It is the figure inserted in the provisional valuation unless objection is taken to it. Increment value duty is charged on the "increment value" of the land on the occasion of a sale or of a death: s. 1. And by s. 2 "increment value" is the amount (if any) by which the site value on the relevant occasion exceeds the

C. A. original site value as ascertained in accordance with the general provisions of the Act as to valuation.

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In case of a sale by an owner of land for a price which may be in excess of the gross value, what is to be done? Sect. 2, sub-s. 2 (a), tells you to take the price paid as the starting point of your calculation; but you are to make "the like deductions as are made under the general provisions of this Part of this Act as to valuation for the purpose of arriving at the site value of land from the total value." These words obviously refer to s. 25, sub-s. 4. The contention on the part of the Crown, which has been adopted by Horridge J., is that you must follow these plain and unambiguous directions. The contention on the part of the appellant, as stated in the special case, is twofold. The increment value is either (A) the difference between the original assessable site value and the assessable site value on the occasion, or (B) the difference between the original full site value and the full site value on the occasion. Neither of these contentions seems to me consistent with the express provisions of the Act—the former, by reason of the words in brackets at the end of s. 25, to which I refer more in detail hereafter; the latter, by reason of the words in s. 2 and s. 25, to which I have already referred.

But another suggestion, deserving careful consideration, is made by Swinfen Eady L.J. in the judgment which he is about to read. It is that there is no necessity to make, and no justification for making, a new "gross value" on the occasion, and that when the actual price paid has been ascertained it is unreasonable to attempt to guess what the land might be expected to realize. I am unable to accept this view. It seems to me inconsistent with the language of the statute. The actual price paid may be either greater or less than would have been reasonably expected. To substitute actual price for "gross value" or "total value" is to effect a complete change in the scheme of the statute.

I am aware that the construction which I feel driven to adopt has the effect of taxing builders' profits. It is not for me to consider the policy of the Act. My duty—and it is by no means an easy duty—is to discover the true effect of the language used

by the Legislature in expressing its intention. I agree with Horridge J. on this point.

I have dealt with the arguments on general principles and without reference to the particular figures stated in the special case, which are accurately worked out by Horridge J. The case finds that there had been no variation in the full site value between April, 1909, and the date of the sale in August, 1910, and that the purchase price (750*l.*) exceeds the gross value (658*l.*). I cannot regard these figures as in any way affecting the application of the principles which I have attempted to lay down.

A further argument was raised upon some words at the end of s. 25: "Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section." It seems to me that the words in brackets expressly refer (*inter alia*) to s. 2, sub-s. 2, and negative the idea that "site value" in that section means "assessable site value."

There are, however, certain observations in the recent case in the House of Lords of *Herbert's Trustees v. Inland Revenue* (1) which demand consideration. The question in that case was whether "assessable site value" can be a minus quantity, and it was held that it might be. In the course of the argument against the Crown a point was made under s. 3, sub-s. 5, and it was said, how can you give effect to a provision which is intended to give the owner a benefit, in certain circumstances, of a sum equal to 10 per cent. of a minus quantity? And it was argued that therefore the assessable site value must be a positive quantity. The Lord Chancellor dealt with this argument at p. 572, but with the most profound respect I have not been able fully to appreciate his view. Lord Atkinson, at p. 576, expressed his inability to solve the difficulty which may arise under

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(1) 50 S. L. R. 569, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326. The citations throughout the judg-

ments of the Master of the Rolls and the Lords Justices are from the *Scottish Law Reporter*.

C.A. s. 3, sub-s. 5. Lord Shaw, on p. 579, and Lord Moulton, at
 1913 p. 582, thought the difficulty might be solved by referring to the
 words in brackets as justifying the view that "site value" in
 s. 3, sub-s. 5, means "full site value" and not "assessable site
 value." Their observations were not necessary for the decision of
 the appeal before the House and neither the Lord Chancellor nor
 Lord Atkinson expressed his concurrence with those observations.

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In these circumstances I feel at liberty, and, indeed, bound, to exercise my own judgment, and to hold that there is nothing in this fresh point in favour of the appellant. In my opinion the appeal must be dismissed.

KENNEDY L.J. This case presents for our solution a question of intricacy, which has arisen as to the application of ss. 2 and 25 of the Finance (1909-10) Act, 1910, to a set of facts stated by a referee in the form of a special case. It is, I think, of the first importance that in seeking the solution one should adhere to the principle stated by the Lord Chancellor early in the course of his judgment in the recent case, cited to us by counsel, of *Herbert's Trustees v. Inland Revenue*. (1) "The duty of a Court of law is simply to take the statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this, the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

The problem set in the present case is to ascertain upon what amount, if any, the increment value duty created by s. 1 of the

(1) 50 S. L. R. 569, at p. 570; [1913] A. C. 326, 332.

Finance Act ought to be paid by Mr. Lumsden, the appellant, on the occasion of his selling the fee simple of a dwelling-house and shop. All the relevant statutory provisions for the ascertainment of the increment value are to be found in ss. 2 and 25 of the Act, and in regard to facts and figures we are bound to accept those which appear in the special case, and are cited in full at pp. 346—349 of the report of this case in the Court below before Horridge J. (1) We start, therefore, with the following data which are given in the special case:

1. Assessable site value in April, 1909, at the time of the provisional valuation under the Act, 105*l*.
2. Full site value (as defined by s. 25, sub-s. 2) both in April, 1909, and in August, 1910, the time of sale, 228*l*.
3. Gross value (as defined by s. 25, sub-s. 1) at the time of sale, 658*l*.
4. Deduction to be made from total value (s. 25, sub-s. 3) to arrive at assessable site value according to s. 25, sub-ss. 4 and 6, in respect of roads to be made, 90*l*.
5. The consideration for the transfer on sale in August, 1910, 750*l*.
6. Capital value of tithe, 33*l*.

We may now turn to the Act itself to find what it prescribes for the proper calculation of increment value.

Sect. 2, sub-s. 1, enacts that, on the occasion such as the sale in the present case on which, under s. 1 of the Act, increment value duty is to be collected, the increment value upon which the duty is to be collected is to be deemed to be the amount (if any) by which the site value of the land at that time exceeds the original site value. The original site value under s. 25, sub-s. 4, means in the present case the assessable site value in April, 1909, which was, as the special case states, 105*l*. We have, therefore, this unquestioned figure as one of the two figures upon the difference between which the duty is to be collected, and we have only to find the other figure, that is to say, the site value of the land on the occasion of the sale. Sect. 2, sub-s. 2 (a), directs us as to the method of finding this site value. It is, according to that section, to be taken to be the value of the

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consideration for the transfer, "subject . . . to the like deductions as are made under the general provisions of this Part of this Act as to valuation for the purpose of arriving at the site value of land from the total value." Therefore, the value of the consideration for the transfer being 750*l.*, all that we have to do in order to arrive at the site value on the occasion is, first, to ascertain what are the deductions prescribed in this part of the Act for the purpose of arriving at the site value of land from the total value, and then to make the like deductions from the sum of 750*l.*

The general provisions of this Part of the Act are the provisions of s. 25, sub-s. 4. That sub-section in five clauses, (*a*), (*b*), (*c*), (*d*), and (*e*), enumerates a series of deductions to be made for the purpose of arriving at the assessable site value of land from the total value; and assessable site value according to an enactment contained in the close of this same section is to be understood wherever site value is referred to in the Act with one exception, namely, where site value on occasion is referred to. With heads of deduction under clauses (*c*), (*d*), and (*e*) we have no concern in the present case, for the reason, it must be presumed, that there was, in the opinion of the referee, no evidence before him which could justify a deduction under any of these heads. But he has, in the special case, given us the figures for the deductions to be made in the present case under clauses (*a*) and (*b*).

Clause (*a*) directs a deduction of the same amount as is to be deducted for the purpose of arriving at full site value from gross value. The special case fixes the gross value in the case of this property at the time of the sale at 658*l.* It also fixes the full site value at the same time at 228*l.* The difference between those two figures is 430*l.*, and that sum, therefore, represents the deduction to be made according to the provision contained in s. 25, sub-s. 4 (*a*).

Clause (*b*) creates a class or head of deduction under which falls the sum of 90*l.* for roads to be made, as stated in the special case. The addition of this sum of 90*l.*, being the deduction under clause (*b*), to the above-mentioned sum of 430*l.*, the deduction under clause (*a*), so as to produce a total sum of 520*l.*,

represents in the circumstances of the present case, in the language of s. 2, sub-s. 2, the "like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value." Therefore, under s. 2, sub-s. 2, if we subtract this total sum of 520*l.* from the sum of 750*l.*, which is "the value of the consideration for the transfer," we have ascertained, in strict obedience to the directions of s. 2, sub-s. 2, the site value of this land on the occasion on which increment duty is to be collected, and that site value is 230*l.* It follows, inasmuch as the original site value, as stated in the special case, is 105*l.*, that the increment value on the occasion of the sale of the fee simple of this property in August, 1910, was 125*l.*, the difference between 230*l.* and 105*l.*, or, as s. 2, sub-s. 1, expresses it, the amount by which the site value of the land on the occasion of the sale exceeded its original site value.

This result, for which the Crown contends, is that to which, as I think, we are guided by adherence to the principle of interpretation enunciated by the Lord Chancellor in the passage from his judgment in *Herbert's Trustees v. Inland Revenue* (1), and it has been adopted by Horridge J. in the judgment under appeal. In my opinion his decision ought to be affirmed in this Court.

The appellant, as appears in the special case, and in the judgment of the learned judge, and as appeared from the argument of his learned counsel, in this Court, has put forward alternative contentions, the acceptance of either of which results in the conclusion that the site value of the property in question on the occasion of the sale did not exceed its original site value, and, therefore, that no increment value duty became payable to the Crown.

There are two matters to which I think it is desirable shortly to advert before dealing with these contentions. The first of these matters is the plausibility which is lent to the conclusion to which the appellant invites the Court to come, namely, that the increment value is in this case zero, by the fact that the amount

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(1) 50 S. L. R. 569, 570, since *Commissioners v. Herbert* [1913] reported sub nom. *Inland Revenue* A. C. 326, 332.

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of the full site value in April, 1909, and in August, 1910, is the same—228*l*. The Solicitor-General pointed out that this identity of values in 1909 and 1910 is an accident. He says, and, no doubt, with truth, that in many cases the original full site value and the full site value on the occasion on which increment value has to be calculated would not be the same, and the variance would take effect in arriving at the deduction to be made under s. 25, sub-s. 4 (a); and the fact of the identity of the amount of full site value in April, 1909, and in August, 1910, in the present case ought not to affect our judgment in interpreting s. 2, sub-ss. 1 and 2, in regard to it. I agree. The duty of this Court is to apply the provisions of the statute as it stands to certain facts and figures fixed for us by the special case, whatever may be the result. At the same time I feel myself forced to admit that on those figures the application of the statute does apparently in the present case, in which full site value is both in 1909 and in 1910 identical, involve, as a result, the inclusion in the increment value of something which is, or, at all events, may be, other than pure site value. But, if this be so, it is for the Legislature, if it thinks fit, to enact a corrective alteration.

The second matter is language used by Lord Shaw and Lord Moulton in the judgments delivered by them respectively in *Herbert's Trustees v. Inland Revenue*. (1) Dealing with s. 3, sub-s. 5, both the noble and learned Lords, if I rightly appreciate that which was said by them as it is stated at pp. 579 and 582 of the *Scottish Law Reporter*, expressed the opinion that the words "site value" in s. 3, sub-s. 5, of the Act must not be understood as meaning "assessable site value." Such opinions are, I need not say, of very great importance; but we have not on this appeal to consider s. 3, sub-s. 5, and, further, the decision of the House of Lords in no way involved or depended upon the acceptance of those opinions. That decision, reversing a judgment of the Valuation Appeal Court, was that the assessable site value of land within the meaning of the Finance Act might be a minus quantity. The opinions in question were elicited from Lord

(1) 50 S. L. R. 569, since reported sub nom. *Inland Revenue Commissioners v. Herbert* [1913] A. C. 326.

Shaw and Lord Moulton by an argument of counsel for the respondents in that case, which was based upon a difficulty which he had contended would arise in the application of s. 3, sub-s. 5, in the event of the decision being that to which the House of Lords ultimately came. They cannot, I think, rightly be treated as opinions which ought to govern our judgment on the very different question arising on other sections of the Act which is raised by the present appeal.

I turn now to the alternative contentions, as I understand them, which have been put forward by the appellant. The first, referred to as (B) in the special case, is that the Court ought to look only at the original full site value of 228*l.* in 1909 and the full site value of 228*l.* in 1910, and, as they are the same, to hold that there is no increment value. Another contention appearing in the special case, which is dealt with by Horridge J. at p. 353 of the report of the case in the Court below(1), is that the occasional site value is the full site value under s. 25, sub-s. 2; that this full site value being 228*l.*, you ought, in order to get at the site value on the occasion of the sale, to deduct from it the 90*l.* for roads and the 33*l.* for tithe, whence results the figure of 105*l.* shewing no increase over the originable assessable site value.

As to each of these contentions, I am unable to reconcile it with the direction for the method of arriving at the site value on the occasion of the sale which is specified in the Act. Each of them excludes from the calculation of the increment value the value of the consideration for the transfer which s. 2 directs, subject to certain deductions from it, to be taken as the site value, where the occasion is a transfer on sale of the fee simple, for the purpose or at all events with the result, possibly, of bringing into the constitution of the taxable increment value, not merely an increase of site value resulting from external circumstances, but also, to some extent, the profit of a fortunate sale at an abnormally high price, such as, in view of the gross value of 658*l.* found in paragraph 6 of the special case, the sale at the price of 750*l.* seems to have been in the present case.

If I appreciated correctly the arguments before us, the principal

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contention for the present appellant, as placed before the Court on his behalf, is the contention which is set out in the judgment by Horridge J. as printed on pp. 350 and 351 of the report in the *Law Reports*. In this the value of the consideration for the transfer—the sum of 750*l.*—is taken into account in the calculation, but, as it appears to me, in a way which is not warranted by s. 2 of the Act or is in accord with the finding in the special case, paragraph 6, that the gross value was 658*l.* The method pursued is as follows :

750*l.* being the price of the land with the incumbrance or charge of the tithe upon it, the capital value of the tithe, 33*l.*, must be added to that figure in order to arrive at the gross value as defined by s. 25, sub-s. 1, of the Act.

Therefore, in order to obtain the figure referred to in s. 25, sub-s. 4 (a), it is from the figure of 783*l.* that you must subtract the agreed figure of full site value—228*l.*—and the resulting difference is 555*l.* This sum of 555*l.* with the addition of the figure of 90*l.* for roads represents the deductions which in accordance with the provisions contained in the concluding paragraph of s. 2 and in s. 25, sub-s. 4, of the Act are to be made from the total value in order to arrive at the assessable site value on the occasion of the sale. The actual sale price—750*l.*—represents the total value as defined by s. 25, sub-s. 3, because it is the price subject to the tithe. Deducting, therefore, from 750*l.* the sum of 645*l.*, which is obtained by the addition together of the deductions 555*l.* and 90*l.*, you get 105*l.* as the assessable site value at the time of the sale, and, as that was also the original site value, it necessarily follows that there is no increment value upon which duty can be charged.

With all respect to those who thus argue, it appears to me that there are at least two serious flaws in the reasoning. I see no right to assume that the actual sale price is to be taken as representing total value ; and the assumption that 783*l.*, i.e., the sum of the sale price, and the capital value of the tithe is to be taken as representing gross value appears to me to be in absolute contradiction with one of the express findings in the special case which is in paragraph 6, that the gross value is 658*l.* We are not at liberty to say that the gross value is something different. Nor does it

appear to me to mean a finding necessarily inconsistent with the fact that a buyer came forward who was willing to pay 750*l.* and to incur the burden of the tithe. In regard to this third contention of the appellant the criticism of Horridge J. which appears on p. 351 of the report of this case seems to me to be just: "I do not think I can adopt the argument put forward on behalf of the respondent"—he is the appellant on the appeal—"as I think it violates the provisions of the Act. Under s. 2 the consideration money is to be subject to the like deductions as are made under s. 25, and in order to introduce the purchase-money as distinguished from the gross value you must first assume that the purchase price is to be substituted under s. 25, sub-s. 3, for the total value of the land, for which I can find no justification, especially as the case distinctly finds that the purchase price exceeds the gross value under s. 25, sub-s. 1, and therefore exceeds the total value under s. 25, sub-s. 3. Even if this is done you have then got to ascertain the gross value by adding the tithe rent-charge to the total value, whereas the section provides that the first thing to be ascertained is the gross value, and the total value is ascertained by deduction from it." These observations appear to me to be well founded. I conceive that this Court is not entitled, because the statute in s. 2, sub-s. 2 (*a*), directs us to ascertain the site value on the occasion by making certain deductions ("the like deductions") from the sale price, to substitute, in ascertaining the amount of these deductions in accordance with s. 25, sub-s. 4, the sale price for the gross value which is expressly prescribed in s. 25, sub-s. 4 (*a*), as an element in the process, and which is found for us in this case to be 658*l.* We are not at liberty to depart from the directions of the statute or from the figures stated in the special case. In my opinion this appeal must be dismissed.

SWINFEN EADY L.J. This appeal raises the question of what is the true construction of s. 2 of the Finance (1909-10) Act, 1910, with reference to ascertaining increment value for the purpose of determining the increment value duty.

For the purpose of this Part of the Act, the increment value of any land is to be deemed to be the amount (if any) by which

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the site value of the land on the occasion on which increment value duty is to be collected, as ascertained in accordance with s. 2, exceeds the original site value of the land as ascertained in accordance with the general provisions of the same Part of the Act as to valuation.

I will refer to the site value of the land on the occasion on which duty is to be collected as the "site value on occasion." The present occasion is a transfer on sale of the fee simple of the land on August 23, 1910. The increment value to be ascertained will, therefore, be the amount (if any) by which the "site value on occasion" exceeds the original site value. It is this increase in site value which is to be taxed; and it is important to bear this expressed object of the statute in mind, in considering the question of construction. By s. 2, sub-s. 2 (a), in order to ascertain "the site value on occasion," when the occasion is a transfer on sale of the fee simple, as in the present case, you start with the value of the consideration for the transfer. From this amount you are to make certain deductions; and these are to be "the like deductions" as are made under the general provisions of this Part of the Act as to valuation, for the purpose of arriving at site value from total value. Sect. 25, sub-s. 4, provides for the deductions which are to be made from the total value for the purpose of arriving at the "assessable" site value, and by the last paragraph of that sub-section, any reference in the Act to site value means the assessable site value as ascertained in accordance with s. 25, unless such meaning is excluded by the words within brackets in the last paragraph. Sect. 26, sub-s. 1, provides that a valuation of all land in the United Kingdom is to be made, and the value is to be estimated as on April 30, 1909. When once the assessable site value or original site value has been fixed as of that date, it has been so fixed once for all and remains a constant quantity. The "like deductions" which are directed to be made by s. 2, sub-s. 2, are, therefore, like deductions to those which are directed to be made from total value for the purpose of arriving at "assessable" site value, unless such meaning is excluded by the words between brackets in the last paragraph of s. 25, sub-s. 4. In my opinion, the

proper construction of the words between brackets is that they should be read as meaning other than "site value on occasion"—in other words, that any reference to "site value" means to "assessable site value," unless the context shews that "site value on occasion" is referred to.

I, therefore, construe s. 2, sub-s. 2, as containing a direction to make the like deductions from the value of the consideration for the transfer as are made under s. 25, sub-s. 4, from total value for the purpose of arriving at assessable site value. It will be observed that the direction is to make "the like deductions" and not "the same deductions." The deductions are those specified in s. 25, sub-s. 4, clauses (a), (b), (c), (d), and (e), or such of them as may be applicable.

Clause (a) is the first deduction. This is to be the same amount as is to be deducted from gross value to arrive at full site value. In the words of the Lord Chancellor in *Herbert's Trustees v. Inland Revenue* (1), "What is here directed to be deducted is the difference made to the selling price of the land by the presence of the buildings, structures, and trees on it, the result affording a measure of the value of the bare site." It is the difference attributable to buildings or any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and all growing timber, fruit trees, fruit bushes, and other things growing thereon.

In the process of arriving at original site value, this difference was deducted from gross value. Now, in arriving at the "site value on occasion" it is the first deduction directed to be made from the consideration for the transfer. The second deduction is under clause (b): Any increase of selling price directly attributable to works executed or capital expenditure for the purpose of improving the value of the land as building land or for the purpose of any business, trade, or industry other than agriculture.

You next deduct such sums (if any) as may be proper under clauses (c), (d), and (e).

(1) 50 S. L. R. 569, 571, since *Commissioners v. Herbert* [1913] reported sub nom. *Inland Revenue* A. C. 326, 334.

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After making these deductions from "the value of the consideration for the transfer," the remainder of this consideration is "the site value on occasion," upon which increment value duty is payable, so far as it exceeds the original site value. This, in my opinion, is the true construction of the statute. There is no difficulty in carrying out its provisions on this construction; whenever the site value on occasion exceeds the original site value the amount of the increment is ascertained, and duty at the rate of 1*l.* for every complete 5*l.* of the increment value is payable upon it, subject to the reduction allowed under s. 3, sub-s. 5.

I now turn to the special case, bearing in mind what the Lord Chancellor said in *Herbert's Trustees v. Inland Revenue* (1), namely, "The increment value directed to be taxed is, as I have already pointed out, simply the difference between present and past site value, and this difference is as real and easily measured, when one of the quantities is minus, as when both are plus."

The special case states that there was no variation in the "full site value" between April 30, 1909, and August 23, 1910, and that the value was 228*l.* on each date. It was also admitted that 90*l.* represented the amount of deduction for roads to be made under s. 25, sub-s. 4 (*b*), and that the capital value of the tithe was 33*l.* On these figures, which are identical on each of the two occasions to be compared, there is and can be no real difference between present and past site value. This difficulty is not met by saying that in this case the "full site value" happens to be the same at each date, but this is merely accidental; because it is in this case, where the "full site value" is the same at both the material dates, that an increased site value of 125*l.* is claimed. Now, it is not difficult to see how this rather astonishing result is brought about. The real crux of the matter lies in the contention that the direction to make "the like deductions" from the "consideration for the transfer" involves a direction to arrive at a new estimated gross value of land on the occasion of a sale. The amount by which the "consideration for

(1) 50 S. L. R. 569, 571, since *Commissioners v. Herbert* [1913] reported sub nom. *Inland Revenue* A. C. 326, 334.

the transfer " exceeds this gross value, from whatever cause the excess in price may arise, is then said to be increment in site value. The statute does not contain any direction to arrive at a gross value of land on the occasion of sale, and the value of the divested site can be arrived at without doing so. The problem is this: On the basis of a given figure of value, what would be the value if divested of all structures and growing things? The problem is the same, whether the given figure is the consideration on sale, or an estimated gross value.

Moreover, although for the purpose of the original valuation of all the land in the kingdom it was necessary to arrive at a figure of gross value, by estimation, it is quite a different matter to require it to be done on every sale which takes place, and when the consideration for the sale is known. A great number of matters enter into the consideration of what sum any particular land might be expected to realize, such as the position of the land, the soil, the nature of any buildings upon it, the demand, and numerous other things. If it were possible for a valuer to be perfectly informed on all these points, he would know exactly what the land would realize, and he would expect it to realize that amount. The less he knows of these matters, the less able would he be to form a correct judgment, and the greater the difference between what the land in fact realizes and what he expected it to realize. It seems strangely anomalous to require, after a sale, an ex post facto valuation of what the land might (erroneously) have been expected to realize. I say erroneously, as, unless the sum to be arrived at differs from the sum actually realized, there is no object in obtaining the valuation. Moreover, the defect of this method is to attribute the whole difference between actual price realized and what the land might have been expected to realize to an increase in site value. Thus, suppose two rival traders, attracted solely by the special suitability of certain buildings for their trade, by bidding against each other, run up the price considerably in excess of what the property might have been expected to realize, the whole of the excess would be treated as an increase in site value. Such a result would be quite inconsistent with the opinion expressed by the Lord Chancellor, that the increment value directed to be taxed is simply the

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difference between present and past site value. In the case under appeal, the alleged increment in site value is really obtained in the following manner. The land, subject to a charge of 33*l.* for tithe, was sold for 750*l.*; it was only "expected to realize" 658*l.*, if free from tithe, that is, after the sale it was erroneously supposed that it would have fetched less than it did; therefore, there is a gain of the difference between 750*l.* and 658*l.*, or 92*l.*, plus 33*l.* the value of the tithe, or 125*l.* in all. This is claimed as "increment in site value" although the full site value has remained the same, and the whole increment entirely depends on such figure as the valuer may fix upon as a new gross value.

If the statute requires such a valuation, it must be made, but I cannot find any direction to make it, and full effect can be given to make "the like deductions" by starting with "the consideration for the transfer," and making the deduction from this amount—that is, such deduction as is necessary to ascertain the divested value.

The fact that the full site value was the same on each occasion, and the deductions for tithe and for works and capital expenditure the same, negatives any real increment in site value; and the process by which an apparent increment was obtained, namely, estimating what the property, if then sold free from incumbrances, might have been expected to realize, deducting this from the consideration for the transfer, and claiming the difference as an increment in the site value, is one not authorized by the statute. I can find no justification in the statute for the contention that wherever the price realized is greater than would have been reasonably expected the whole of the excess in price is to be deemed to be an increment in site value. I have only to construe the statute by the language used, and I cannot discover any such justification in the direction to make deductions from the consideration for the transfer to arrive at "the site value on occasion." I am aware that the deduction to obtain a divested value is stated to be 430*l.*, but this figure is arrived at upon the basis of a new gross value, which, in my opinion, is erroneous.

I am of opinion that the appeal should be allowed, and that the special case should be answered by saying that the appellant

was not liable to pay any increment value duty on the occasion in question.

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COZENS-HARDY M.R. The appeal will be dismissed with costs.

Appeal dismissed.

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NOTE.—Finance (1909-10) Act, 1910, s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of 1*l.* for every complete 5*l.* of that value accruing after the 30th day of April, 1909, and—

"(a) on the occasion of any transfer on sale of the fee simple of the land or of any interest in the land, in pursuance of any contract made after the commencement of this Act . . . , the duty, or proportionate part of the duty, so far as it has not been paid on any previous occasion, shall be collected in accordance with the provisions of this Act."

Sect. 2: "(1.) For the purposes of this Part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this Part of this Act as to valuation.

"(2.) The site value of the land on the occasion on which increment value duty is to be collected shall be taken to be—

"(a) where the occasion is a transfer on sale of the fee simple of the land, the value of the consideration for the transfer . . . ; subject in each case to the like deductions as are made, under the general provisions of this Part of this Act as to valuation, for the purpose of arriving at the site value of land from the total value."

Sect. 25: "(1.) For the purposes of this Part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.

"(2.) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon

"(3.) The total value of land means the gross value after deducting the

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amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the 30th day of April, 1909, and to any covenant or agreement restricting the use of the land entered into or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood, and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final.

“(4.) The assessable site value of land means the total value after deducting—

“(a) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

“(b) Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred bona fide by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; . . .

“Any reference in this Act to site value (other than the reference to the site value of land on an occasion on which increment duty is to be collected) shall be deemed to be a reference to the assessable site value of the land as ascertained in accordance with this section.”

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Foreign Judgment—Action—Proceedings contrary to Natural Justice—Contract—Assignment—Defence of Fraud—Exclusion of Evidence of Fraud.

In an action upon a foreign judgment the English Court will not hold the foreign judgment to be contrary to natural justice where the foreign Court has jurisdiction over the subject-matter of the suit and the parties thereto, and where the parties have duly and in accordance with English ideas of natural justice been summoned to the foreign Court so as to have had a hearing or an opportunity of being heard.

A certain company in Quebec owed a sum of money to one N. He assigned part of this debt to the plaintiff as security for a loan. He subsequently assigned the whole debt to the defendant, subject to the rights of the plaintiff, in consideration of an undertaking by the defendant to pay to the plaintiff the amount of the debt due from N. to the plaintiff.

The plaintiff sued the defendant in Canada to recover the amount of the debt. The defendant in that action pleaded that he had been induced to enter into the undertaking by the fraudulent misrepresentation of N. as to the financial position of the company. The Canadian Court held that evidence of this fraud was inadmissible, and gave judgment for the plaintiff.

In an action in England upon this judgment:—

Held, that the judgment was not contrary to natural justice.

POINT OF LAW arising upon the pleadings.

The plaintiff claimed a sum of 4018*l.* upon a judgment of the Superior Court of the Province of Quebec affirmed by the Superior Court of Review in the Dominion of Canada.

The defence contained the following paragraphs:—

“ 2. The defendant says that the decisions in the Superior Court for the Province of Quebec and in the Superior Court of Review in the Dominion of Canada were contrary to and offended against English views of natural and substantial justice, and that substantial injustice to the defendant was according to English views there committed by reason whereof the said decisions should not be enforced in England. The cause of action in Canada was as hereinafter set forth based upon a contract into which the defendant had been induced to enter by fraud and deceit; and

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the defendant submits that it is contrary to natural justice and to the ideas of natural justice as prevalent in the Courts of England to enforce as hereinafter appears a contract induced by fraud and duly repudiated and, in order to enforce it, to exclude, as was in fact done, evidence of that fraud on the ground that the written contract did not contain the fraudulent misrepresentations and statements that induced and were intended to induce the defendant to enter into the said contract.

"3. In the year 1906 the Silver Spring Brewery, Limited, of Sherbrooke, Quebec, Canada, owed to one Seth Nutter now deceased, but then managing director thereof, the sum of \$26,675.00 as the agreed balance of a certain loan repayable with interest on June 1, 1914. In May, 1906, the said Nutter in consideration of a loan to him of \$4667.50 to be repaid within a year assigned to one T. H. Carter as security therefor one equal fifth part, namely, \$5335.00 of the aforesaid balance loan. On or about September 10, 1906, the said Nutter in consideration of a loan to him of \$14,000.00, to be repaid within a year therefrom with interest at the rate of 8 per cent. per annum, assigned to the plaintiff the remaining four fifths (namely \$21,340.00) of the said balance loan.

"4. On or about October 31, 1906, for the consideration hereinbelow stated, the said Nutter by assignment in writing assigned to the defendant all his right title and interest in and to the said balance loan of \$26,675.00, subject to the aforesaid obligations to the said Carter and the plaintiff. On the same date the said Nutter by writing assigned and transferred to the defendant 3000 ordinary shares and 60 preference shares in the said brewery company. The consideration for the said two assignments to the defendant was the undertaking by the defendant with the said Nutter to pay on his behalf the said sums of \$4667.50 and \$14,000.00 with the interest payable thereon to the said Carter and the plaintiff respectively and the defendant's undertaking to pay to the said Nutter a sum of \$18,552.50 as follows, \$5000.00 cash down, \$5000.00 on December 31, 1906, which sums were duly paid by the defendant, and the balance of \$8552.50 on January 1, 1908.

"5. During the negotiations between the said Nutter and the

defendant before and on the said date, October 31, 1906, and in order to induce the defendant to enter into the said agreement and transfer of that date, the said Nutter placed before the defendant the balance-sheet of the said company dated December 31, 1905, and a statement of the financial position of the said company dated June 30, 1906, and falsely and fraudulently represented and stated verbally to the defendant that the said balance-sheet and financial statement were in fact true accurate and correct and truly showed the financial position of the said company, and further falsely and fraudulently represented and stated verbally to the defendant that the said outstanding accounts, book debts and debts on customers' paper shown by the said balance-sheet and statement to be due and owing to the said brewery company were all good and collectable and that the same could all be collected and would be paid in full, whereas to his knowledge and in fact the said balance-sheet and financial statement were untrue inaccurate and incorrect and there was a very large amount of debts, amounting to nearly \$40,000.00, included in the said balance-sheet and statement as being good, which were to the said Nutter's knowledge absolutely bad and worthless. The said Nutter made the said false and fraudulent misrepresentations and statements in order to induce the defendant and did thereby induce the defendant to enter into the transactions of October 31, 1906.

"6. The plaintiff's action was an action to enforce in the plaintiff's favour the said undertaking given by the defendant to the said Nutter to pay the said \$14,000.00 to the plaintiff and was wholly and solely based on the said undertaking.

"7. The defendant had before the said action to the plaintiff's knowledge repudiated the said assignments purchase and undertaking and had refused to the said Nutter to be bound thereby or to in any manner perform or observe the same. The said Nutter had before the plaintiff's action against the defendant was commenced brought an action against the defendant to enforce the said contract of October 31, 1906, and to compel the defendant to pay to the plaintiff the sum the defendant undertook to pay as aforesaid and the defendant had repudiated the said contracts assignment and undertaking on the grounds

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hereinbefore mentioned, and was defending the said action on the said grounds when the said Nutter died.

"8. The defendant duly pleaded in the plaintiff's said action the said matters and defences in paragraphs 4 and 5 hereof. But the said Court contrary to natural justice, while holding that the defendant was not unable to repudiate the said contract nor unable to restore to the said Nutter the consideration he had given to the defendant, refused to entertain the said plea of the defendant's undertaking having been procured by the said Nutter by deceit and fraud as aforesaid and refused to permit any evidence though duly tendered by the defendant to prove and establish the said plea and determined to enforce the said undertaking notwithstanding the said plea and notwithstanding the alleged fraud and deceit and rejected any evidence thereof. The plaintiff made no allegation whatever that the making of the said plea was in any way contrary to good faith on the part of the defendant or that the defendant was in any matter except on the ground aforesaid precluded from making the said plea.

"9. The material reason was given by the Court in the words following :—' That the evidence adduced by defendant that said Nutter was guilty of fraud and false representations in declaring as alleged previous to the said sale to defendant that the outstanding debts due to the said company were good and collectable whereas they were in reality bad and worthless to the extent of nearly \$40,000.00 must be held to be illegal inasmuch as although fraud and error are alleged there is no fraud or error in any of the terms contained in the said deed of sale to defendant, and what was said by either party during the negotiations leading up to the said sale is governed by the written deed of sale signed by the parties and [qu. which] must be held to contain all the terms and conditions of the sale as the defendant had only to stipulate in the said deed that the sale was made subject to the conditions that the said debts were warranted to be good and collectable, and therefore the principle of caveat emptor must be applied.' The defendant contends that the evidence thus excluded and declared illegal was both legal and admissible, and that it was contrary to natural justice according to English views to exclude it, and to enforce a contract procured by fraud

and deceit and duly repudiated. The defendant's evidence so rejected would if admitted have established the said fraud and deceit."

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The plaintiff in paragraph 2 of the reply contended that the above paragraphs of the defence were no answer in law to the plaintiff's claim.

An order in chambers was obtained under Order xxv., r. 2, of the Rules of the Supreme Court, 1883, for the hearing of the point of law thus raised on the pleadings.

J. Sankey, K.C., and *J. D. Crawford*, for the plaintiff. Put shortly the case raised on these pleadings is this: The Silver Spring Brewery Company owed Nutter a debt of some \$26,000 in round numbers. Nutter borrowed a sum of \$4000 from Carter and a sum of \$14,000 from the plaintiff, Robinson, and as security assigned to Carter one fifth, and to the plaintiff the remaining four fifths, of the debt of \$26,000 owing to him from the company. Nutter then made an arrangement with the defendant, Fenner, whereby Fenner agreed to pay off the debt of \$4000 due to Carter and the debt of \$14,000 due to the plaintiff and to take transfers of the one fifth and four fifths of the debt due from the company to Nutter, and also as further security certain ordinary and preference shares in the company. During these negotiations it is alleged that Nutter made to the defendant certain fraudulent misrepresentations as to the financial position of the company. The plaintiff sued the defendant for the \$14,000 which the defendant had promised Nutter to pay to the plaintiff. The defendant as a defence set up the fraud of Nutter. The Superior Court of the Province of Quebec gave judgment for the plaintiff, which judgment was subsequently affirmed by the Superior Court of Review of the Dominion of Canada.

The plaintiff now brings his action on this colonial judgment; the defendant pleads that the judgment is contrary to natural justice. The gist of the defendant's objection is that the Canadian Court rejected evidence of Nutter's fraud. That is a matter of the procedure of the Court. The procedure of a foreign Court may be contrary to natural justice where it permits judgment to issue against a party without giving him notice of

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action: *Buchanan v. Rucker*. (1) But that means that the Court has proceeded without jurisdiction. That seems to be the only instance where the process of a Court can be said to be contrary to natural justice so as to make the judgment invalid: Dicey, *Conflict of Laws*, 2nd ed., p. 404. With the justice of the decision of the foreign Court our Courts have no concern. The justice of the foreign judgment is presumed until it is shewn to be contrary to natural justice: *Henderson v. Henderson*. (2) That is shewn where it appears that the foreign Court had no jurisdiction over the defendant: *Godard v. Gray* (3); *Schibbsby v. Westenholz* (4); *Turnbull v. Walker*. (5) If the foreign Court has jurisdiction, then a mere irregularity in the procedure is not enough to invalidate the judgment: *Pemberton v. Hughes*. (6) It matters nothing that one of the parties has been the victim of a fraud, unless the fraud be that of the successful party and the foreign Court has been deceived by it: *Abouloff v. Oppenheimer* (7); *Vadala v. Lawes*. (8) The mere reception or non-reception of evidence of fraud is not a matter into which our Courts will inquire: *Scarpetta v. Lowenfeld*. (9)

Danckwerts, K.C., and *Goodman*, for the defendant. The argument for the plaintiff gives too narrow an interpretation to the words "contrary to natural justice" when used to describe a foreign judgment which, though otherwise valid, will not be enforced in this country. The words do not refer merely to process of serving the defendant with notice of an action. It is sufficient if the judgment be "wanting in the conditions of natural justice": *Messina v. Petrocchino* (10); as, for example, where the judge is himself a party interested: *Price v. Dewhurst*. (11) It would be contrary to natural justice to bind a party to a contract admittedly obtained by fraud. Equally it is contrary to natural justice to exclude evidence of fraud tendered by a defendant who complains that he has been cheated into a contract. It is futile to insist, as the Canadian Court

(1) (1808) 9 East, 192.

(6) [1899] 1 Ch. 781.

(2) (1844) 6 Q. B. 288.

(7) (1882) 10 Q. B. D. 295.

(3) (1870) L. R. 6 Q. B. 139.

(8) (1890) 25 Q. B. D. 310.

(4) (1870) L. R. 6 Q. B. 155.

(9) (1911) 27 Times L. R. 509.

(5) (1892) 67 L. T. 767.

(10) (1872) L. R. 4 P. C. 144.

(11) (1837) 8 Sim. 279.

has insisted, that the fraudulent misrepresentation should be embodied in the contract before evidence of it will be admitted, because by hypothesis the person who has been tricked into making the contract believes that the representation is true and is lulled into security. His sense of security is the success of the fraud. In effect the Canadian Court has said that a contract obtained by fraud cannot be set aside. That is contrary to the common law of nations. A perverse and deliberate refusal on the part of a foreign Court to recognize the laws of other civilized countries may be a ground for refusing to give binding effect to the judgment of the foreign Court, even if it be a judgment in rem : *Simpson v. Fogo*. (1)

Sankey, K.C., in reply. The case of *Simpson v. Fogo* (1) is one of very limited application. There a foreign Court gave judgment in favour of persons deriving title from mortgagors of a ship as against the mortgagee on the ground that the mortgage, though perfectly valid in England where it was made, was not valid by the foreign law. The Court ignored the English law which ought to have regulated the rights of the parties. That case has no application to the present: see Dicey, Conflict of Laws, r. 95, note 2, 2nd ed., p. 403.

Cur. adv. vult.

1912. April 26. CHANNELL J. read the following judgment:—
In this case an order was made that the question of law arising upon the second paragraph of the reply (which was to the effect that the defence shewed no answer to the action) should be tried by a judge before the questions of fact. The order did not, as is constantly done, give leave to either party to refer to any other documents than the pleadings. Mr. Sankey, for the plaintiff, desired to refer to the record of the case tried in Canada, out of which the present action arose, but Mr. Danckwerts objected, and it seemed to me that I could not go outside the defence as pleaded without some amendment of the reply or of the order. Mr. Sankey did not press for the amendment owing to the delay which would be caused. The result may be that the judgment I am about to deliver may not decide anything of great practical value to the parties.

(1) (1863) 1 H. & M. 195; 32 L. J. (Ch.) 249.

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The action is brought on a judgment of a Canadian Court, and the defence sets out matter which is alleged to shew that the decision of that Court was not in accordance with English ideas of justice, and is therefore not a judgment upon which an action can be brought here.

The material paragraphs of the pleadings are these: [The learned judge then read paragraphs 2 to 9 of the defence as set out above, and continued:] That is the defence. There is a reply, which simply raises the point of law to be decided.

The extract from the judgment set out in paragraph 9 of the defence is far from clear. "Illegal" does not seem a very appropriate word. I, however, read the passage as meaning that the Court decided that their rules of evidence precluded them from receiving parol evidence that representations were made and had influenced the making of the contract, when those representations were not expressed in the contract, and that being so, they could not of course receive evidence that the supposed representations were false and fraudulent, and thus it became impossible in this case to shew that the contract was induced by fraud. It may be that if I saw the whole record I should find that this view is not correct, but I think it is quite as favourable to the defendant (or perhaps more so) as if I thought the Court had decided that a contract could not be set aside on the ground of fraud either in any case, or in this particular case by reason of the plaintiff being an assignee without notice of the fraud or anything of that kind. In any view of it, the judgment appears, according to our law, to be clearly wrong, but that of course is not enough: *Godard v. Gray*(1); and whatever the expression "contrary to natural justice," which is used in so many cases, means (and there really is very little authority indeed as to what it does mean), I think that it is not enough to say that a decision is very wrong, any more than it is merely to say that it is wrong. It is not enough, therefore, to say that the result works injustice in the particular case, because a wrong decision always does. So far as I can see, all the instances given of what is "contrary to natural

(1) L. R. 6 Q. B. 139.

justice" for the purpose of preventing a foreign judgment being sued on here are instances of injustice in the mode of arriving at the result, such as deciding against a man without hearing him or without having given him any notice or the like. That is why it seems to me more favourable to the defendant here to take the view that the Court decided that they could not hear evidence of the misrepresentation being made in fact, than that they decided that they could not entertain the question of fraud, because the former view brings the case nearer to the category of unjust procedure and not merely unjust result. There is, however, the recent decision of my brother A. T. Lawrence J. in *Scarpetta v. Lowenfeld* (1), that rules of evidence are for the foreign tribunal, and that the fact that it acted on rules which we do not now think just is not ground for saying that the judgment cannot be sued on here. In that case, no doubt the rules complained of in Italy were in fact the English rules not so very long ago, and that very strong reason for not holding that they were contrary to natural justice does not of course apply to the present case. At the same time the error, if it is an error, of the Colonial Court here seems like a misapplication of our rule that terms agreed on during the negotiation of a contract, and not inserted in the contract when put into writing, cannot be relied on, except in some cases as a ground for reforming the written expression of the contract. That rule of evidence could not be said to be contrary to natural justice, and any misapplication of it could not be inquired into here. It is clear that the Courts in this country will not inquire into the question whether or no the foreign Court did or did not act upon a correct view of the law and procedure of its own State: *Pemberton v. Hughes* (2), per Rigby L.J. It must be assumed, therefore, that the law of Canada did preclude the reception of the evidence of fraud. Again, a mere plea that the contract sued on in the foreign Court was procured by fraud is bad, as was decided in *Bank of Australasia v. Nias* (3); see 16 Q. B. at p. 726, where the twelfth plea is set out which the Court held to be bad. That decision no doubt proceeded partly on the view that the defendant ought to

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(1) 27 Times L. R. 509.

(2) [1899] 1 Ch. 781, at p. 794.

(3) (1851) 16 Q. B. 717.

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have set up his plea of fraud in the foreign Court, and that if he did not, he could not set it up here, and the plea which was there held bad did not allege that the defence of fraud had been set up and overruled in the foreign Court, which the defence here does. I think, however, that the Court in that case also intimated the view that if the plea was set up in the foreign Court and that Court decided against it, still the Court here would not inquire whether it had done so rightly or wrongly. As explained clearly in the judgment of Lindley M.R. in *Pemberton v. Hughes* (1), quoted above, the main, if not the only, question in these cases really is the competence of the foreign Court in the sense explained in that judgment, and by the text-writers there referred to whose opinions appear to be adopted by the Master of the Rolls. The doctrine of the modern cases seems to be that on parties subject to the jurisdiction of a foreign Court who have been duly and in accordance with our idea of natural justice summoned to that foreign Court, that is to say have been so summoned as to have had a hearing or an opportunity of having a hearing, there is imposed by our law an obligation enforceable here to abide by and perform the judgment of that Court to whose jurisdiction they are so subject, and that this obligation exists none the less because the Court here may think that the result in the particular case is unjust. Possibly it might be more correct to say that in such a case the Court here will not inquire whether the decision is unjust. This obligation may be described as a modern development of the common law, and the general statements in the older cases as to not enforcing judgments contrary to natural justice seem now in practice limited to procedure contrary to natural justice. The real question is the competence of the foreign Court in the matter of its jurisdiction over the subject-matter of the suit and over the parties to it, and of the competence of the Court in the particular suit by its having duly summoned the parties and given a hearing.

I think I must in this case give judgment for the plaintiff on the ground, put shortly, that the facts set out in the defence shew, at most, an unjust result arrived at by a Court, competent

(1) [1899] 1 Ch. 781.

as regards jurisdiction over the parties, and not a decision arrived at in a mode which is according to our notions unjust.

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Judgment for plaintiff.

Solicitors for plaintiff: *Lawrence Jones & Co.*

Solicitors for defendant: *H. A. Graham & Wigley.*

NOTE.—The defendant appealed. The appeal came on for hearing on June 5, 1912. After the argument had proceeded for some time, the Court (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.) came to the conclusion that the allegations in the pleadings did not raise the point of law in such wise that it could be satisfactorily determined under Order xxv., r. 2, of the Rules of the Supreme Court, 1883. The Court therefore decided that the order of Channell J. should be discharged and that the case should proceed to trial in the ordinary way.

On April 21, 1913, the case came on for hearing before Channell J. without a jury. The learned judge held that there was no evidence that the fraud (if any) of Nutter induced the defendant to undertake the payment of the debt to the plaintiff; and further that the defendant could not set aside the undertaking while he still held the assignment of the debt due from the company. Adhering to the opinion expressed in the former judgment, he held that there was nothing contrary to natural justice in the judgment of the Canadian Courts, and gave judgment for the plaintiff.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* FRANK GREENING.

*Murder—Manslaughter—Provocation—Man and Woman living together—
Illicit Intercourse with another Man.*

The sudden discovery by a man that a woman with whom he is living as his wife is in a disreputable house affords no such provocation in law as will reduce the crime of killing her from murder to manslaughter.

The law as to a husband who suddenly discovers his wife in the act of adultery has no application in the case of a man and woman not being husband and wife although they be living together as husband and wife.

Words in *Rex v. Palmer* [1913] 2 K. B. 29, commented on.

APPLICATION for leave to appeal from conviction.

The appellant was convicted before Atkin J. at Birmingham Assizes on July 14, 1913, of the wilful murder of Elizabeth Ellen Hearne, otherwise Davies.

The deceased was a married woman who had been separated from her husband for nine years. At the date of the murder and for about eight weeks previously the appellant and the deceased woman were living together as man and wife.

There was evidence that the deceased woman was addicted to drunkenness. On April 6, 1913, she was at the house of a Mrs. Mumford. The appellant had on former occasions objected to the deceased woman visiting this house on the ground that it was a house of ill fame. The appellant came to the house. He stood in the doorway. The deceased woman was sitting on a sofa in the sitting-room. He asked the deceased woman for a certain key. She said that she had not got it. The appellant in his evidence said as follows: "I asked her why she had not gone back home, and she didn't say anything to that, and I said, 'Rose will want her clothes,' and she said, 'You are all Rose,' and I said 'I shall want mine,' meaning my underlinen; I meant before night. She smiled and she said 'You are always wanting something; you have got no clothes; I don't care for the revolver you have got.' With that, on the impulse of the moment, I fired

at the girl." He fired three times at her. All three shots took effect. She died on the following day.

In the course of summing up the learned judge said: "If it is proved that the prisoner or any prisoner took life . . . it is for him to shew that he did it under circumstances which justified him in it, or that he did it under circumstances which reduce the crime from one of murder to one of manslaughter. That is for him to prove if the Crown once satisfies you that the prisoner was in fact the man who caused the death of the deceased woman . . . You can have no doubt in your mind that that Sunday afternoon of April 6, that man did in fact draw a revolver, aim it at the deceased woman, and fire three shots at her; and from the effect of those shots or one of them she died. You none of you have any doubt that the man himself in a moment of passion or impulse did it. But I have to tell you that amounts to murder unless it is established by the evidence to your satisfaction that the supposed circumstances are such as to make the crime amount to manslaughter.

"Now if a man is subjected to a great provocation there are circumstances under which [if] acting in heat of blood at once on the impulse of the moment he uses a deadly weapon and kills, that killing is not murder but manslaughter. But it must be a provocation that is adapted, as one may say, to the crime; it must be a provocation either by some act or some very gross personal indignity; or it might be in some case such a provocation as adultery, finding your wife in adultery, which might reduce the crime to even less than manslaughter. But I have to tell you that no provocation by words, no provocation by gesture, can amount to such a provocation as will reduce the crime of killing to manslaughter. A man is not entitled because somebody provokes him by insulting words or provoking words, or because a woman nags at him, or does something he objects to her doing, a man is not entitled to draw a revolver and shoot her. I have to tell you, as a matter of law, that such provocation does not amount to such justification as would reduce this charge to manslaughter . . ."

After directing the attention of the jury to the evidence of what occurred on April 6, the learned judge proceeded: "It

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is my duty to tell you that that evidence discloses no such provocation as could reduce this killing to manslaughter. If you are satisfied that this man fired this revolver, he fired at this girl without provocation, or with no provocation that could at all reduce this crime from one of murder”

The prisoner having been convicted of murder applied for leave to appeal.

R. A. Willes, for the prisoner. The learned judge ought to have told the jury that the sudden discovery by a man that a woman with whom he is living as his wife is having illicit intercourse with another man may be a provocation sufficient to reduce the crime of killing her from murder to manslaughter. In *Rex v. Palmer* (1), in dealing with the effect of a sudden confession by a wife of past adultery as an exception to the rule that mere words do not constitute such provocation, Channell J. said : “ The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married.” The learned judge there treats persons living together as husband and wife as being in the same category for this purpose as persons lawfully married, so that a sudden discovery of illicit intercourse would constitute sufficient provocation.

Sir W. Ryland Adkins and *Costello*, for the Crown, were not heard.

The judgment of the COURT (Bray, Avory, and Lush JJ.) was delivered by

BRAY J. The appellant was convicted of murder. He asked for leave to appeal on the ground that the learned judge misdirected the jury in telling them that there was nothing to justify them in reducing the crime from murder to manslaughter. He directed them in these words : [The learned judge then read the passages from the summing up of Atkin J.

(1) [1913] 2 K. B. 29, at p. 31.

which are set out above, and continued:] There may perhaps be some doubt as to whether in certain circumstances a gesture may not amount to provocation, but that is not material in the present case. Apart from that this was a clear direction, and if it is wrong in law the conviction cannot stand. But is it wrong in law? It is the duty of a judge to tell the jury what amounts to provocation such as will reduce homicide from murder to manslaughter, and further, if there is any such evidence, to tell them so. If there was any such evidence in the present case the direction of the learned judge was wrong. The alleged provocation was the sudden discovery of the deceased woman in the house of Mrs. Mumford, which, for the purposes of this appeal, I will assume to have been a disreputable house. Is that a sufficient provocation in law? To establish that it is, a passage was cited from the judgment of Channell J. in *Rex v. Palmer* (1) in these words: "But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife."

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The last few words of that passage suggest a loophole. But Channell J. did not directly say that the circumstances would amount to provocation in the case of unmarried persons living together. He left that case open. In my view the law which has been applied in the case of husband and wife has no application to the case of a man and woman living together. It is a gross offence against a husband that his wife should commit adultery, but there is no such offence against a man if a woman not his wife, although he may be living with her, chooses to commit such an act. In the latter case the man has no such right to control the woman as a husband has to control his wife. A husband may legally complain if his wife frequents a house of ill fame. A man has no such right in the case of a woman not his wife. The two cases are entirely different. Only the sudden discovery of the gravest possible offence which a wife can commit against her husband has given rise to this particular case of provocation.

I ought to add that the evidence in this case does not amount to anything like a sudden discovery that the deceased woman

(1) [1913] 2 K. B. 29, at p. 31.

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Application dismissed.

Solicitor for appellant: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

W. H. G.

C. A.

[IN THE COURT OF APPEAL.]

1913 <i>May 20, 21 ;</i> <i>July 2.</i> <hr/>	BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, LIMITED v. LONDON AND NORTH WESTERN RAILWAY COMPANY.
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Practice—Discovery—Affidavit of Documents—Privilege—Documents coming into Existence after Litigation in contemplation for the Purpose of furnishing Solicitor with Evidence and Information to enable him to conduct Defence—Order XXXI., r. 19A (2.).

In an affidavit of documents on behalf of the defendants in an action of negligence privilege was claimed for certain documents in a schedule to the affidavit on the ground that "they came into existence and were made after this litigation was in contemplation and in view of such litigation for the purpose of obtaining for and furnishing to the solicitor of the defendant company evidence and information as to the evidence which could be obtained and otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants."

A judge at chambers, after inspecting the documents under the provisions of Order XXXI., r. 19A (2.), made an order by which some of the documents were protected and others were ordered to be disclosed, the dividing line being drawn at the date on which the plaintiffs first preferred their claim against the defendants:—

Held, first, that the judge at chambers and the Court of Appeal were entitled under Order XXXI., r. 19A (2.), to inspect the documents for the purpose of deciding on the validity of the claim of privilege, as no particular formula of words in the affidavit could be conclusive against evidence furnished by the documents themselves; and, secondly, after inspecting the documents, that protection had been appropriately claimed for them by the affidavit and that the dividing line drawn by the judge in chambers was inappropriate in the particular case.

It is not necessary that the affidavit should state that the information

was obtained "solely" or "merely" or "primarily" for the solicitor, if it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated.

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APPEAL of the defendants from an order made in chambers by Bucknill J.

The action was for negligence. A quantity of hay belonging to the plaintiffs and stored at the Soho Pool station of the defendants was destroyed by fire on April 20, 1912. On April 22, 1912, the plaintiffs wrote to the defendants a letter in which they said that they would hold the defendants liable for the loss of the hay. The defendants denied all the allegations of negligence.

An affidavit of documents was made on behalf of the defendants by their secretary, in paragraph 2 of which he said: "The defendants object to produce the said documents set forth in the second schedule hereto on the ground that the same are privileged and came into existence and were made after this litigation was in contemplation and in view of such litigation for the purpose of obtaining for and furnishing to the solicitor of the defendant company evidence and information as to the evidence which will be obtained and otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants." Schedule 2 of the affidavit was in the following terms: "Documents tied up in a bundle and numbered 1 to 45. Correspondence between the defendants' solicitor and the defendants since the issue of the writ of summons in the action. Instructions to counsel and counsel's opinions and the evidence."

An affidavit was filed on behalf of the plaintiffs in which the deponent said: "In my belief, the defendants, their agents or employes, have or have at some time had in their possession or power the documents referred to: the written reports of the fire causing the damage the object of this action, made on or shortly after the said date by porters and other agents and employes of the defendants to the station agent at Soho Pool station and by the said station agent to the district superintendent and by the district superintendent to the superintendent of the line."

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The plaintiffs took out a summons before the Master, by which they asked for (1.) a further affidavit of documents on the ground that certain specific documents had not been disclosed in the affidavit; this application was decided by the Master in favour of the defendants; (2.) for production of the documents; and (3.), if the application for production failed, for inspection under Order xxxi., r. 19A (1), of the documents for which privilege was claimed.

The Master ordered that the defendants should within fourteen days file an affidavit stating whether the following documents, namely, way bills, time sheets, log signal and storage books with reference to the Soho Pool station and the sidings thereat, for April 20, 1912, shewing the movements of the engine or engines in question in the station on the above date, were or had at any time been in their possession or power, or in the possession or power of their agents or employees or any of them, and if the same had at any time been but were no longer in their possession or power, stating when they parted with the same and what had become of them, and that the defendants should within three days produce for the Master's inspection the documents numbered 1 to 45 referred to in the second schedule to the defendants' affidavit of documents.

On appeal to Bucknill J., the learned judge discharged the Master's order, and ordered the defendants to produce within three days for his inspection the documents numbered 1 to 45 referred to in the second schedule of the defendants' affidavit of documents; and on March 31 he inspected the said documents and expressed his opinion that the documents marked by him with a red cross were privileged, and that those documents in the bundle which were not so marked and which were earlier in date than the others were not privileged. The learned judge drew a line at the date on which the defendants first received a letter of claim from the plaintiffs, the effect of which was to disclose some of the documents and to protect others with

(1) Order xxxi., r. 19A (2.), is in the following terms: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the

Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege."

reference to the date on which the plaintiffs first made a claim against the defendants.

The defendants appealed, asking by their notice of motion "that so much of the order herein made by the Hon. Mr. Justice Bucknill dated March 31, 1913, as orders that the defendants do within three days produce for the judge's inspection the documents numbered 1 to 45 (referred to in the second schedule to the defendants' affidavit of documents) and as declares that those documents referred to in the second schedule of the defendants' affidavit of documents which are earlier in the said bundle of documents than the first document marked by the learned judge with a red cross are not privileged from production by the defendants to the plaintiffs be rescinded."

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Eustace Hills, for the defendants. The documents are privileged. The learned judge was not entitled to look at the documents, and if he did so it would be useless, the only question being as to the formal sufficiency of the affidavit. What the document contains is immaterial; what is material is the purpose for which it came into existence. The defendants acted on the authority of *Collins v. London General Omnibus Co.* (1), where it was held that, though at the time of the making of the report there was no action begun or even threatened, the circumstances of the case were such as to raise a high probability, amounting almost to a certainty, that litigation would ensue, and that the report, having come into existence in view of litigation reasonably apprehended for the purpose of being laid before the defendants' professional adviser, was privileged from inspection. The word "solely" does not, it is true, appear in the defendants' affidavit; but it is unnecessary to insert it: *London, Tilbury and Southend Ry. Co. v. Kirk & Randall* (2); *Nordon v. Defries*. (3) The case of *Cook v. North Metropolitan Tramways Co.* (4) is distinguishable; in that case the report was one of a series of reports made daily in the

(1) (1893) 63 L. J. (Q.B.) 428.

(2) (1884) 28 Sol. J. 688.

(3) (1882) 8 Q. B. D. 508.

(4) (1889) 54 J. P. 263; 6 Times
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ordinary course of business and as to every accident that occurred without reference to any threats of litigation.

Inspection by the Court under Order xxxi., r. 19A, ought not to be ordered; that power is given to enable the judge to test the validity of the claim of privilege, and in the present case its validity cannot depend on an examination of the documents. [He cited on this point *Ehrmann v. Ehrmann* (1); *Williams v. Quebrada Railway, Land and Copper Co.* (2); *Lafone v. Falkland Islands Co.* (3)] Assuming a report to be made immediately after the accident, it does not matter what it contains; its contents cannot affect the question of privilege.

This case falls within the decision in *Southwark and Vauxhall Water Co. v. Quick* (4), in which it was held that documents coming into existence in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, were privileged if prepared with a bona fide intention of being laid before him for the purpose of taking his advice. It is apparent from the affidavit how the documents in the present case came into being. [He also cited *Bustros v. White* (5); *Pacey v. London Tramways Co.* (6); *Friend v. London, Chatham and Dover Ry. Co.* (7); *Cossey v. London, Brighton and South Coast Ry. Co.* (8)]

McCardie (*Horace Rowlands* with him), for the plaintiffs. The decision of Bucknill J., which was a considered judgment, was right. The principle is stated clearly and with great force in *Jones v. Great Central Ry. Co.* (9) The general rule is that each party must give discovery, the first exception to which is that established by *Minet v. Morgan* (10), where it was held that a plaintiff could not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation. The only exceptions to the general

(1) [1896] 2 Ch. 826.

(2) [1895] 2 Ch. 751.

(3) (1857) 27 L. J. (Ch.) 25.

(4) (1878) 3 Q. B. D. 315.

(5) (1876) 1 Q. B. D. 423.

(6) (1876) 2 Ex. D. 440.

(7) (1877) 2 Ex. D. 137.

(8) (1870) 22 L. T. 19.

(9) [1910] A. C. 4.

(10) (1873) L. R. 8 Ch. 361

rule are communications between solicitor and client, documents obtained by the client at the request of the solicitor in order to enable him to defend the action, and documents prepared by the client in order that they may be laid before his solicitors as material for the defence or for the conduct of the action; the present case does not come within any of these exceptions. The privilege does not extend to mere reports in fulfilment of a servant's ordinary duty to his master, even though they are sent to him for the use of his solicitors. The affidavit in the present case is insufficient; there ought to be words in it indicating that the documents came into existence for the primary purpose of affording information to the defendants' solicitors. We formally ask the Court to look at the documents. [He also cited *Bustros v. White* (1); *Westinghouse v. Midland Ry. Co.* (2); *Southwark and Vauxhall Water Co. v. Quick*. (3)]

Eustace Hills in reply.

Cur. adv. vult.

July 2. VAUGHAN WILLIAMS L.J. I have read the judgments of Buckley L.J. and Hamilton L.J. and I entirely agree in the result of those. Dealing with the details I would like to say I rather prefer the way in which Buckley L.J. has put his judgment to that in which Hamilton L.J. has put his, but I entirely agree with the result.

BUCKLEY L.J. read the following judgment:—An affidavit of documents is sworn testimony which stands in a position which is in certain respects unique. The opposite party cannot cross-examine upon it and cannot read a contentious affidavit to contradict it. He is entitled to ask the Court to look at the affidavit and all the documents produced under the affidavit, and from those materials to reach the conclusion that the affidavit does not disclose all that it ought to disclose. In that case he can obtain an order for a further and better affidavit. Further, under the particular rule relating to a specific document, Order xxxi., r. 19A (3.), he may file an affidavit specifying

(1) 1 Q. B. D. 423.

(2) (1883) 48 L. T. 462.

(3) 3 Q. B. D. 315.

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further documents and calling upon the party making the affidavit of documents to account for them. But subject to these qualifications the affidavit of documents cannot be called in question, but must be accepted as being correct. The question for determination here is I think whether the documents in question fall within the principle of *Anderson v. Bank of British Columbia* (1) or within that of *Southwark and Vauxhall Water Co. v. Quick*. (2) In the former case the principals in London wrote to Oregon for information. The resulting document was not privileged, and this upon the ground that it was not a confidential communication obtained by or for the solicitor or as materials forming, as it is called, part of the brief of the party making the affidavit. In the latter case the document was privileged because it was sufficiently protected by an affidavit which described it as being obtained by or for the legal professional adviser of the party. The language in which the affidavit in the present case is framed is, in my opinion, such as to bring the case outside *Anderson v. Bank of British Columbia* (1) and within *Southwark and Vauxhall Water Co. v. Quick*. (2) It is not I think necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all.

Having inspected the documents, as I think we are entitled to do, I am satisfied that this affidavit has not been made with a view to sheltering under a form of words, which in itself covers the ground, documents which ought to be produced. Were I of a contrary opinion I should not hesitate to make an order to defeat that intention. For I concur in the opinion which Hamilton L.J. has expressed at greater length that no particular formula of words can be conclusive against evidence furnished by the documents themselves or inferences to be drawn from

(1) (1876) 2 Ch. D. 644.

(2) 3 Q. B. D. 315.

their contents and from a reasonable view of the circumstances under which documents of their class come into existence.

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The order under appeal is one which protected some and disclosed others of the documents with reference to the date at which the plaintiffs first preferred a claim. This might in some cases, but is not I think in this case, an appropriate line of demarcation. I fail to see why the documents which upon this ground are disclosed are any less entitled to protection than those which are protected. Protection is I think appropriately claimed by the affidavit for them all and I see no reason for denying it. Under these circumstances I think that this appeal must be allowed.

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HAMILTON L.J. The defendants' affidavit admits the relevancy of the documents in question in this case, but claims privilege for them. I think that "for the purpose of deciding as to the validity of the claim for privilege" Bucknill J. was entitled to inspect the documents, if in his discretion he thought fit to do so. The words of Order xxxi., r. 19A (2.), are quite general and cover this case.

It has been very ably argued, first, that he could not do so, and, second, that if he did so it would be fruitless. The grounds are the same for each point. They are that the privilege flows from the existence of a certain matter of fact, namely, the purpose for which the documents were created, and that the only competent evidence for or against the existence of such purpose is the defendants' affidavit itself, which, being unexceptionable in form, is conclusive on the point. Hence, it is said, the learned judge could not inspect the documents for the purpose of deciding a claim which he was in law bound to decide solely on affidavit, and, further, even if he did so, as the question is not one such as relevancy sometimes is, when the contents of the document could themselves decide the question, his inspection would be fruitless. Whatever the contents of the documents, he would be bound to accept the affidavit. It comes to this, that there is no claim of privilege to be decided here, the only possible question for decision being the formal sufficiency of the affidavit.

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Although an affidavit of discovery cannot be controversially challenged, as by cross-examination, counter-affidavit, or administration of interrogatories, *Jones v. Montevideo Gas Co.* (1) lays down authoritatively how and how far it can be challenged otherwise: "If from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the Master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit, but except in cases of this description no right to a further affidavit exists." Now that r. 19A (2.) has given the judge power to inspect documents as to which there is a disputed claim of privilege, the documents which are not disclosed are available, either at the instance of the opposite party or in the discretion of the judge himself, as material on which to shew the insufficiency of the affidavit, because both are equally "documents therein referred to." The only difference is that in such case they are to be seen only by the judge and not by the party. In fact the decisions in *Ehrmann v. Ehrmann* (2) and *Ainsworth v. Wilding* (3) shew that the terms of the rule are to be read widely and that they include inspection of the documents, for which privilege is claimed, for the purpose of deciding the validity of such a claim, even when the ground of the claim is the allegation that the documents were brought into existence in fact for a purpose which would make them privileged. I accept these decisions. I think in so far as the documents themselves and their contents throw light on the validity of the claim the judge can consider them. I think, further, that in doing so he can bring to bear on them the ordinary knowledge of life and business which he possesses. He could not well do otherwise. He is not bound to regard them as documents of the nature of which he can know nothing. I think that he can test the accuracy of the affidavit and of the terms in which it claims the privilege by means of the documents themselves. I do not say that I think there is any ground for doubting the good faith of the affidavit in this case, but misunderstandings as to the meaning and application of the rules on

(1) (1880) 5 Q. B. D. 556.

(2) [1896] 2 Ch. 826.

(3) [1900] 2 Ch. 315.

discovery, and also misconceptions as to the character and contents of particular documents, are constant, and the judge cannot be wrong at least in using the documents themselves to see whether such misunderstanding or misconception has in fact occurred.

It has been argued for the respondents that the claim of privilege is bad in form, because, when stating that the documents came into existence for the purpose of being submitted to the defendants' legal advisers, it does not say that they did so "primarily" or "substantially" or "specially." It is not, contended that the affidavit must state that they did so "solely." The contention in reply that "for the purpose" means in itself as a matter of construction that such purpose is the principal if not the only purpose is, I think, unsound. The affidavit as sworn in my opinion makes the purpose of submission to the solicitor equally one of many purposes, and is consistent with that purpose being the least important and the most unusual of them all. It is then argued by the appellants that even so the claim is good in form, but upon this argument every document that ever comes into existence in the ordinary course of business would be effectually covered by the claim. The larger the business and the better its organization the more necessary it is that written records should be regularly made of every detail and every occurrence, common and uncommon. In a sense not altogether illusory every one of these records, from the office boy's postage book to the chief cashier's ledger, comes into existence for the purpose, if peradventure there should be litigation or fear of it, of putting the legal advisers in a position to advise fully and to conduct the case successfully, though in nine hundred and ninety-nine cases out of a thousand no such use of the entries will ever be made. To hold such documents privileged merely because it can be shewn of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice. No doubt it is in itself undesirable that any obstacles should be thrown in the way of an employee, who

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C. A. is willing to make a clean breast to his employer, when anything
 1913 has happened by his fault, but there is not much fear that this
 BIRMINGHAM result will follow from strict adherence to the existing practice
 AND of discovery. If a servant's integrity is such that he will write
 MIDLAND the truth, even though it presently imperils his own wages or
 MOTOR costs himself or a fellow servant his situation, he is not likely to
 OMNIBUS be deterred by the fear that its discovery in litigation some day
 COMPANY, or other may cost his master the verdict. At any rate, this
 LIMITED risk has to be run under the existing rules of practice. Again,
 v. I think it a dangerous proposition that any particular formula
 LONDON must as such be conclusive even against the evidence of the
 AND scheduled documents themselves. The clause of the affidavit is
 NORTH a hybrid, made up by combining a variety of phrases which have
 WESTERN passed muster in decided cases. It is dangerous to rely on
 RAILWAY. these artificial creations. Claiming privilege in an affidavit of
 Hamilton L.J. documents is not like pronouncing a spell, which, once uttered,
 makes all the documents taboo. The draftsman should draw
 each affidavit with reference to the actual facts of the case and
 bearing them in mind. The selection of well-tried formulæ
 from a precedent book only leads to that inconsiderate swearing
 which is the bane of the practice as to discovery. The only
 authority cited to us for the proposition that the formula need
 not contain the statement that submission to the solicitor was
 the primary or the substantial purpose with which the docu-
 ment was brought into existence, and may even negative it, is
London and Tilbury Ry. Co. v. Kirk & Randall (1), a decision
 which, if correctly reported, I think is wrong. Were it other-
 wise a great part of the observations of the Court in *Collins v.*
London General Omnibus Co. (2) would be not merely otiose but
 misleading. I intentionally avoid saying in what words this or
 any other claim to privilege might be successfully couched. The
 precise point here is whether the learned judge could decide the
 validity of the claim by examining the documents, the terms of
 the affidavit, paragraph 2, notwithstanding, and I am clear that
 he could. He was entitled to see whether from their character
 or contents they tended to shew that the documents ought to be
 privileged or were such as, under well-settled authorities like

(1) 28 Sol. J. 688.

(2) 63 L. J. (Q.B.) 428.

Anderson v. Bank of British Columbia (1) and others, must be disclosed even though in certain events they may be used by and useful to the solicitor of the deponent.

In general I think it is a matter of discretion for the judge to discriminate between particular documents and to decide whether as to one the validity of the claim is established, and as to another not. I think that what has been said of settling interrogatories under Order xxxi., r. 1, equally applies to r. 19A (2.): "Where a judge has had interrogatories brought before him and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if any one chooses to appeal from that allowance, I hope he never will be allowed to succeed unless he can shew some serious question of principle, in which the judge in the leave he has given has made a material error": per Kay L.J. in *Peck v. Ray*. (2) Hence I should not have been disposed to interfere with the order which Bucknill J. in his discretion made as to particular documents, but on examining them I think he has proceeded on a wrong principle. He has drawn his distinguishing line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptionable, and particularly so in mercantile disputes, is inappropriate in such a case as the present, where, as in *Collins v. London General Omnibus Co.* (3), at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably ensue.

As this Court must now exercise its own discretion on documents which, unless it or a higher tribunal orders them to be disclosed, must remain unknown to the plaintiffs, nothing is to be gained by any attempt to discuss the mode in which it is to be exercised. I am prepared to acquiesce in the view taken on this matter by the other members of the Court.

Appeal allowed.

Solicitor for plaintiffs: *Sydney Morse*.

Solicitor for defendants: *C. de J. Andrewes*.

(1) 2 Ch. D. 644.

(2) [1894] 3 Ch. 282, at p. 288.

(3) 63 L. J. (Q.B.) 428.

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In re OSBORN & OSBORN.*July 4, 7, 30.*

Practice—Solicitor—Bill of Costs—Bill for Party and Party Costs delivered to Opposite Party—Bill for Solicitor and Client Costs subsequently delivered to Client—Contents of Bill.

A firm of solicitors had acted for a client in a successful action. They delivered a bill of costs as between party and party to the unsuccessful party which, after taxation, was paid. They afterwards, upon a request from their client to send in a bill of solicitor and client costs, delivered to him a bill which included all the items already included in the bill of party and party costs. The client then took out a summons asking for an order that the bill, so far as it related to solicitor and client items, and in so far as the items had not been allowed on taxation and paid by the defendants, should be referred to the Master to be taxed; which summons was dismissed:—

Held, that the solicitor and client bill as delivered properly included the party and party items that had formed the subject of the bill previously delivered to the opposite party, and that the summons asking for a separate taxation of the solicitor and client items was rightly dismissed.

APPEAL of Martin Buhrbanck from an order of Channell J. at chambers.

The appellant had recovered judgment in an action brought by him in the High Court against Lockwood & Co., Limited, and the respondents to this appeal, Messrs. Osborn & Osborn, had acted as solicitors in the action for the appellant. After the proceedings had come to an end they delivered two bills of costs as between party and party to the defendants. The bills, which amounted to 1679*l.* 18*s.* 4*d.*, were taxed at 1289*l.* 11*s.* 6*d.*, for which amount the taxing Master gave his certificate. This amount was paid by the defendants. The plaintiff, Buhrbanck, then requested the respondents to deliver to him their bill of costs and cash account as between solicitor and client, and they delivered to him their full bill of costs as between solicitor and client, including in it the items which were comprised in the party and party bill of costs already mentioned; these items, which amounted to 1289*l.* 11*s.* 6*d.*, were placed in an inner column. The solicitor and client items, which could not be

charged against the defendants, amounted to 416*l.* 17*s.* 2*d.*, making a total of 1706*l.* 8*s.* 8*d.* The cash account shewed that the appellant was indebted to the respondents in a sum of 2*l.* 13*s.* 6*d.*

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The appellant having taken out a summons against the respondents for taxation of the bill, an order for taxation was made by a Master.

Before the taxing Master it was pointed out that it would be necessary to tax the whole of the bill of costs, to which the appellant objected that the party and party items had already been taxed and therefore did not form part of the bill requiring taxation. The taxing Master declined to assent to this view.

A summons was then taken out by the appellant asking for an order that "the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitors in so far as they relate to solicitor and client items, and in so far as such fees, charges and disbursements have not been allowed in taxation and paid by the defendants (Lockwood & Co.) in the action in which the applicant was plaintiff and the said Lockwood & Co. were defendants, be referred to the Master to be taxed." On the hearing of the summons the Master made an order that the application be dismissed with costs, and an appeal to Channell J. was also dismissed with costs.

Buhrbanck now appealed to the Court of Appeal.

Schiller, for the appellant. It is obvious that as between solicitor and client a larger amount might be allowed in respect of many items than as between party and party, and it is not fair to the appellant that he should have to run the risk of having to pay larger sums than were paid by the defendants upon the party and party taxation. Besides, the appellant ought not to have to pay a taxing fee upon the larger amount and upon the original taxing fee. *In re Park, Cole v. Park* (1) shews that taxation ought only to be directed of the particular items to which objection is taken. There is jurisdiction to order taxation of part of a bill: *In re Johnson & Weatherall*. (2)

(1) (1888) 41 Ch. D. 326.

(2) (1888) 37 Ch. D. 433; (1890) 15 App. Cas. 203.

C. A. *J. B. Matthews*, for the respondents. *In re Park, Cole v. Park* (1) has nothing to do with the point; that was a case of a taxation under the Solicitors Act, 1843, while this is an application to the general jurisdiction of the Court. The case is concluded by authority. In *Drew v. Clifford* (2) it was held that a solicitor could not deliver a bill to a client in which the party and party costs were all lumped together, but that the different items must be specified. The decision in *In re Mercantile Lighterage Co., Ltd.* (3) exactly covers the present case, and so too do the judgments in *Cobbett v. Wood*. (4) [He also cited *Waller v. Lacy*. (5)]

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Schiller, in reply, cited *Ex parte Jarman*. (6)

Cur. adv. vult.

VAUGHAN WILLIAMS L.J. read the following judgment:—In *In re Park, Cole v. Park* (1), before Stirling J., the learned judge is reported on p. 331 to have said, in a case in which the statutory jurisdiction under the Solicitors Acts did not come in question, the bills being admittedly bills that were all delivered more than a year before the testator's death, and there being no special circumstances to entitle the executor to require taxation under the provisions of that Act: "Having heard what was said on both sides, I made inquiry as to the practice in chambers, and, so far as I could discover, it seemed to be the practice for the chief clerk to look into the bill, and to ascertain from his own examination, or from what was pointed out to him by the parties, whether there were any items in it which required investigation; and if he found that there were he referred the bill to the taxing Master to be dealt with in the way I have mentioned, i.e., not in the same way as on a taxation under the Solicitors Acts, which involves particular consequences as regards costs, but simply as a mode by which the claim might be investigated, the costs being dealt with in the same way as the costs of any other claim by a creditor under the administration, i.e., allowed to the claimant, and added to his proof, in the absence of any impropriety of

(1) 41 Ch. D. 326.

(2) (1825) 2 C. & P. 69.

(3) [1906] 1 Ch. 491.

(4) [1908] 2 K. B. 420.

(5) (1840) 1 Man. & G. 54.

(6) (1877) 4 Ch. D. 835.

conduct on his part. In the present case the chief clerk appears to have looked into the bill and found certain items which seemed to him to require explanation. Thereupon, without any special directions being given, it went before the taxing Master, and, as I gather, he proceeded or proposed to proceed upon it as if it had been simply referred to him for taxation. To that the claimants objected, and the matter has been brought into Court and argued before me." And Stirling J. made the following order: "That it be referred to the taxing Master to inquire and state whether any and which of the items to be marked by the plaintiff in red ink in the four several bills of costs (describing them), and which the plaintiff, the surviving creditor of the said J. C. Park, shall dispute, are fair and proper to be allowed and to what amount respectively. The claimants to add their taxed costs of the application to their claim, and the costs of the plaintiff to be costs in the action."

In the present case the appeal was against the decision of Master Archibald given on May 21, 1913, refusing to order "that the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitors in so far as they relate to solicitor and client items, and in so far as such fees, charges and disbursements have not been allowed on taxation and paid by the defendants (Lockwood & Co.) in the action in which the applicant was plaintiff and the said Lockwood & Co. were defendants, be referred to the Master to be taxed, and that the said solicitors give credit for all sums of money by them received of or on account of the applicant, and refund what (if anything) they may on such taxation appear to have been overpaid, and that the Master do tax the costs of the reference and certify what shall be found due to or from either party in respect of the bill and demand, and costs of the reference to be charged (if payable) according to the event of the taxation pursuant to the statute, and that upon the foregoing application being granted the applicant may be at liberty upon paying the said solicitors' costs of the same to discontinue any further proceedings under the order made on the 9th day of April, 1913. And further take notice that you are required to attend before the judge in chambers at the Central Office, Royal Courts of Justice, Strand, on Thursday,

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the 12th day of June, 1913, at 10.30 o'clock in the forenoon, on the hearing of an application by the said applicant that the bill of fees, charges and disbursements delivered to the applicant by the above-named solicitors in so far as they relate to solicitor and client items and in so far as such fees, charges and disbursements have not been allowed on taxation and paid by the defendants (Lockwood & Co.) in the action in which the applicant was plaintiff and the said Lockwood & Co. were defendants be referred to the Master to be taxed."

Now it is plain that if and in so far as this taxation was to take place under the Solicitors Act, 1843, the Master did right in refusing to make the order asked for under the notice of motion which I have just read.

In re Johnson & Weatherall (1) and *In re Park, Cole v. Park* (2) are cases in which the taxation did not take place under the jurisdiction of the Solicitors Act, but under a special order for taxation of part of the bill. But in the present case there is no such special order for the taxation of part of a solicitor and client bill, nor do I think that there was any ground for making such special order. The only ground suggested was that there had already been a taxation of the party and party costs, and this according to the practice as certified to us by Master King is not sufficient ground for an order to tax a portion of a solicitor's bill apart from the Solicitors Act of 1843.

It appears that on taxation generally it might not be necessary to tax afresh the bulk of the items, but, as Buckley L.J. points out in his judgment, which he has allowed me to read, an item allowed at a lower figure as between party and party may have to be allowed at a higher figure between solicitor and client, and he goes on to say: "It does not occur to me that a party and party item could ever require to be reduced as between solicitor and client."

I agree entirely in the conclusion of Buckley L.J., but I wish to say that I do not approve of the present practice in so far as the fee charged for taxation is concerned. It is plain that this fee is calculated on the basis that in so far as the items included in the party and party taxation are concerned the fee

(1) 37 Ch. D. 433.

(2) 41 Ch. D. 326.

for taxation is charged twice, whereas as a fact there is only one taxation of such items. The fees go to the State and not to the taxing Master, but in my judgment there should, on taxation between solicitor and client, only be the fee charged on the items in fact taxed, just as there is in a case where there is an order for taxation of part of a bill or bills of costs and the portion already taxed as between party and party is only looked at for explanation, so as to see how much has been taxed off as being too much to allow between party and party.

The result of this is that this appeal is dismissed with costs.

BUCKLEY L.J. read the following judgment :—In my opinion this appeal fails. In an action in which the client was plaintiff and Lockwood & Co. were defendants the plaintiff recovered judgment with costs. The case was appealed and the appeal was dismissed with costs. The solicitor carried in for taxation as between party and party two bills amounting in the aggregate to 1679*l.* 18*s.* 4*d.* These were taxed at 1289*l.* 11*s.* 6*d.*, and that amount was paid by the defendants to the solicitor. Subsequently the solicitor delivered his bill of costs as between solicitor and client to the present appellant. The bill was in respect of the litigation above mentioned, and also a further matter of the client against Glenister & Co., Limited. That bill was made out in two columns so as to shew in the first column the several items of the taxed bills amounting in the aggregate to the above-mentioned sum of 1289*l.* 11*s.* 6*d.*, and in a second column the additional items claimed by the solicitor as between solicitor and client. The aggregate amount of the bill as between solicitor and client was 1706*l.* 8*s.* 8*d.*, being the above-mentioned 1289*l.* 11*s.* 6*d.* and 416*l.* 17*s.* 2*d.* for solicitor and client charges in the Lockwood action and for the solicitors' bill in the Glenister matter. On April 9, 1913, the client obtained the common order to tax the bill. Subsequently, however, he made the application before us, which was refused by the Master and refused by the judge. It is an application for an order to tax the bill so far as it relates to the solicitor and client items and so far as the bill has not been allowed on taxation and paid by the defendants Lockwood & Co., and that the applicant may be at

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C. A. liberty to discontinue further proceedings under the order of
1913 April 9, 1913. In my opinion the refusal to order such a
taxation was right.

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It is not disputed that there is jurisdiction to order taxation of part of a bill. That jurisdiction exists not under s. 37 of the Solicitors Act, but under the inherent jurisdiction of the Court apart from the statute. It has been exercised in the case of taxation as between London agent and country solicitor of so much of the London agent's bill as related to one of the actions included in the bill in which the London firm had acted as agents for the country solicitor: *In re Johnson & Weatherall*. (1) The question is whether that jurisdiction ought to be exercised in this case.

A solicitor's bill against his client for costs in an action in which party and party costs are recoverable against the opposite party ought to contain the whole bill of the fees, charges, and disbursements in reference to the business to which it relates and not merely a bill of the extra costs chargeable as between solicitor and client. As long ago as 1825 it was held in *Drew v. Clifford* (2) that it was not sufficient to include the party and party costs in a lump sum, but that the bill must be delivered with items, and in 1840 in *Waller v. Lacy* (3) that the bill ought to give a history of the cause so as to enable the officer to judge of the propriety of the various items, and that the delivery of a bill containing merely the extra costs is not sufficient. The solicitor should deliver a bill of the whole costs, giving his client credit for the sum received for party and party costs. Accordingly in *Cobbett v. Wood* (4) it was decided in this Court that a bill not containing the items allowed on taxation between party and party was not a sufficient bill within the Solicitors Act. The bill as delivered, therefore, is, in my opinion, a proper bill. It is contended and is no doubt the fact that as regards the items of party and party costs it will not be or may not be necessary for the taxing Master to consider them again. This is not, however, necessarily the case. For instance, an item allowed at

(1) 37 Ch. D. 433; 15 App. Cas.
203,

(2) 2-C. & P. 69.

(3) 1 Man. & G. 54, at p. 69.

(4) [1908] 2 K. B. 420.

a lower figure as between party and party may have to be allowed at a higher figure as between solicitor and client. There are several items of this kind in the bill. An instance is to be found at p. 56 under Instructions for Brief. It does not occur to me that a party and party item could ever require to be reduced as between solicitor and client. Even if the client had himself paid counsel's fees, the amount of those fees would be properly charged as between solicitor and client as forming part of the "demand" of the solicitor against the client, and credit would be given for the amount in the cash account. The client would for this purpose be treated as having paid the sum on behalf of his own solicitor. But inasmuch as items might be increased, it is not true that the party and party taxation necessarily concludes, although *prima facie* it does conclude, the proper sum to be allowed in the solicitor and client taxation. But beyond this the bill to be delivered under the Act of Parliament is to be a bill of the fees, charges, and disbursements for business done by the solicitor. It is that bill which is taxable under the Act of Parliament, and it is upon a review of that bill as a whole that the taxing Master is to adjudicate. The substantial point between the parties is really upon the incidence of the costs of taxation, having regard to the fact that a sixth is or is not taxed off. If the 1289*l.* 11*s.* 6*d.* is included in the bill, the client has but a small chance of taxing off more than a sixth, whereas if the 416*l.* 17*s.* 2*d.* alone is taxed he might succeed in so doing. If there were reason to suppose that the solicitor standing in this position of advantage had inflated his solicitor and client items, knowing that he did not stand at peril as to the costs of taxation, that might be good ground for certifying specially under the proviso in the sixth paragraph of the 37th section. But no question of that kind is suggested here. The bill is, in my opinion, taxable under the statute in the ordinary course. I think the common order to tax originally made was right, and that that order is in fact a formidable difficulty in the client's way in obtaining any other order. But, apart from that, I think that Channell J. was right, and that this appeal must be dismissed with costs.

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With reference to what the learned Lord Justice has said as

C. A. to the amount paid in respect to taxation, I offer no opinion at
 1913 all. It may be that the fee payable on taxation, being as it is an
 arbitrary sum, is not unfair, considering in some cases it is too
 large and in other cases too small. At any rate the amount
 of the fee payable for taxation is not, I think, for me.

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Appeal dismissed.

Solicitors for appellant : *Rehder & Higgs.*

Solicitors for respondents : *Osborn & Osborn.*

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July 22, 23,
 24, 30.

THE KING v. THE COMMISSIONERS FOR THE GENERAL PURPOSES OF THE INCOME TAX FOR KENSINGTON.

Revenue—Income Tax—Foreign Possessions—Place of Assessment—Jurisdiction to assess at Place of Residence—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 108—Additional First Assessment—Additional Commissioners to “make” Assessment within Three Years after Year of Assessment—“If the surveyor discovers” First Assessment inaccurate—Necessity for Legal Evidence—Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 52—Finance Act, 1907 (7 Edw. 7, c. 13), s. 23, sub-s. 2.

The jurisdiction to assess a person to income tax under Sched. D in respect of profits and gains from foreign possessions is not by s. 108 of the Income Tax Act, 1842, conferred exclusively upon the Commissioners acting respectively for London, Bristol, Liverpool, and Glasgow. That section merely gives an option to the taxpayer to be assessed at one of those places by delivering a statement of his profits and gains from foreign possessions to the Commissioners for that place, and upon that being done the Commissioners come under an obligation to assess him. Therefore where a person chargeable to income tax has not delivered a statement of his profits and gains from foreign possessions to the Commissioners acting for one of the above-mentioned places, the Commissioners acting for the place where he resides have jurisdiction to assess him in respect thereof.

By s. 52 of the Taxes Management Act, 1880, as amended by s. 23, sub-s. 2, of the Finance Act, 1907, “if the surveyor discovers” that any properties or profits chargeable to income tax have been omitted from a first assessment, or that any person so chargeable has not made a full and proper or any return, then as regards the duties chargeable under Sched. D the additional Commissioners shall at any time within the year of assessment or within three years after the expiration thereof make an assessment on such person in an additional first assessment in such sum as according to their judgment ought to be

charged on such person, subject to objection by the surveyor and to appeal:—

Held, (1.) that it is not a condition precedent to the jurisdiction of the additional Commissioners to make an additional first assessment that the surveyor should have legal evidence of the insufficiency or inaccuracy of the first assessment, but that it is sufficient if he satisfies himself that the first assessment is insufficient or inaccurate.

(2.) That an assessment is "made" when it is signed by the additional Commissioners and not when it is confirmed by the general Commissioners, and that therefore an additional first assessment signed by the additional Commissioners within three years after the expiration of the year of assessment is "made" in time though it is not confirmed by the general Commissioners until after the expiration of that period.

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RULE NISI to the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington in the county of Middlesex to shew cause why a writ of prohibition should not issue to prohibit them from proceeding on any one of the five several assessments to the income tax under Sched. D, one for each of the years ending April 5 in 1908, 1909, 1910, and 1911 respectively, and a further additional assessment for the year ending April 5, 1908, whereby one Felix Avelino Aramayo was assessed in respect of profits of foreign property said to be derived from the firm of Aramayo, Francke & Co., being a firm resident in Bolivia, before the said property was transferred to Messrs. Aramayo, Francke & Co., Limited, a company incorporated in and resident in the United Kingdom at 52, Billiter Buildings, Billiter Street, in the city of London, on the following grounds:—(1.) The property from which such profits were derived had been wholly transferred away from the said Felix Avelino Aramayo and such profits had wholly ceased before April 6, 1907, the commencement of the first of the said years of assessment, and no part of the profits on which such assessments purported to be based was received nor was any part alleged to have been received during any of the years of assessment. (2.) The whole of the profits on which such assessments purported to be based were received prior to April 5, 1907, and might have been assessed prior to the commencement of the Finance Act, 1907, and therefore could not legally be assessed later than April 5, 1908. (3.) The whole of the profits on which such assessments purported to be based were profits or gains arising from foreign

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possessions, and were received in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842 (1), assessable by the Commissioners acting for the city of London and not elsewhere. (4.) The additional first assessment No. 5780 (No. 5 below mentioned) referred to in a notice dated, April 29, 1911, signed by the clerk to the said Commissioners, was not made within three years after the expiration of the year of assessment, contrary to s. 23 of the Finance Act, 1907. (2)

(1) Income Tax Act, 1842, s. 108 :
 "The duty to be assessed by virtue of this Act in respect of the profits or gains arising from foreign possessions or foreign securities, or in the British plantations in America, or in any other of Her Majesty's dominions, may be stated to and assessed by the respective Commissioners acting for the respective places hereinafter mentioned, videlicet, London, Bristol, Liverpool, and Glasgow, according to the regulations hereinafter mentioned, as if such duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively; and such duty shall be stated to and assessed and charged by the Commissioners acting for such of the said places at or nearest to which such property shall have been first imported into Great Britain"—now by s. 5 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the United Kingdom—"or at or nearest to which the person who shall have received such remittances, money, or value from thence, and arising from property not imported as aforesaid, shall reside Provided always, that whenever the produce or the profits or gains arising from such possessions or securities as last aforesaid shall have been imported partly into the port of London and partly into any of the outports of Bristol, Liverpool, or

Glasgow, or shall have been received by any person partly in the city of London and partly in any of the said outports, within the period of making up the account on which the duty is chargeable by this Act according to the rules herein contained, the whole of the duty chargeable in respect of such produce, profits, or gains so imported or received shall be assessed and charged by the Commissioners acting for the said city of London, and not elsewhere, and as if the whole of the said produce or the said profits or gains arising within the said period had been imported into or received in London"

(2) Taxes Management Act, 1880, s. 52 : "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, or has obtained and been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorised by the Tax Acts, then"

"(2.) As regards the duties chargeable under Schedule D of the Income Tax Acts, the additional Commissioners shall at any time after the said first assessments have been signed and allowed, but within

Notice of the rule was directed to be given to the surveyor of taxes for the Kensington district as well as to the Commissioners. The rule was obtained on May 26, 1911.

The five assessments above mentioned were all made on the applicant, F. A. Aramayo, and were as follows:—

No. 1. An additional first assessment to the amount of 20,000*l.* under Sched. D of the Income Tax Acts for the year ending April 5, 1908, in respect of "foreign possessions," the income tax payable being 1000*l.*, and the assessment having been signed by the additional Commissioners for the division of Kensington, in the county of Middlesex, on February 25, 1909, and allowed and confirmed by the general Commissioners for Kensington on May 6, 1909.

No. 2. A similar assessment to the above for the year ending April 5, 1909, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the general Commissioners on January 20, 1911.

No. 3. A similar assessment for the year ending April 5, 1910, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the general Commissioners on January 20, 1911.

No. 4. A first assessment for the year ending April 5, 1911, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the general Commissioners on December 2, 1910.

four months after the expiration of the year to which such first assessments relate, make an assessment on any such person in an additional first assessment in such sum as according to their judgment ought to be charged on such person, subject to objection by the surveyor and to appeal."

By s. 23, sub-s. 2, of the Finance Act, 1907, "the time during which an assessment may be amended or an additional first assessment made under section 52 of the Taxes Management Act, 1880, . . . shall be any time within the year of assessment or within three years after the expiration thereof."

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No. 5. A further additional first assessment for the year ending April 5, 1908, on "foreign possessions" to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on March 31, 1911, and allowed and confirmed by the general Commissioners on May 25, 1911 (called No. 5780 in ground 4 of the rule).

In each of these assessments the place of abode of the applicant was described as being at 102, Cromwell Road, which was in the parish of South Kensington within the district of Kensington.

It appeared from the affidavit filed in support of the rule (1) that the applicant, Felix Avelino Aramayo, was and had been for over eight years a partner in the firm of Avelino Aramayo & Co., of 52, Billiter Buildings, Billiter Street, in the city of London, and was the owner of a private residence at 102, Cromwell Road, Kensington. Prior to January 12, 1907, the applicant was also a partner in a firm known as Aramayo, Francke & Co., which owned possessions and carried on trade in Bolivia, and did not own any possessions or carry on any trade in the United Kingdom. On January 12, 1907, the business carried on and all the possessions owned by the said firm of Aramayo, Francke & Co. were transferred to and had since that date been entirely owned by Aramayo, Francke & Co., Limited, a company incorporated in and resident in the United Kingdom at 52, Billiter Buildings, aforesaid, and the whole of the rights and interest of the applicant in profits derived from the said business and the said possessions had been transferred to and the whole of the receipts therefrom had since January 12, 1907, been received by the said company, and the applicant had received no profits or receipts from the said business nor from the said foreign possessions other than the dividends or shares owned by him in the said company. The company was duly assessed by the General Commissioners for the Purposes of the Income Tax Acts

(1) The affidavit, which was sworn on May 22, 1911, was made by the applicant's solicitor, who stated that he had acquired knowledge of the

matters appearing therein by having acted for twenty years as the solicitor for the applicant in relation thereto.

in the city of London in respect of all profits received after January 12, 1907, from the said business and possessions, such assessments being made on the said company for the year ending April 5, 1907, and for each subsequent year of assessment up to and including the year ending April 5, 1911, the assessments being based on the profits earned by the company, and the company had paid all the amounts so assessed and had deducted the correct amount of income tax from the dividends due to the applicant in respect of such shares, and had duly accounted for the same to the Commissioners of Income Tax. On February 23, 1909, the surveyor of taxes for the Kensington district wrote to the applicant stating that a question had arisen as to his liability to assessment for the years 1907-8 and 1908-9 in respect of profits derived by him from Messrs. Aramayo, Francke & Co. prior to possession being given to the said company, and on March 9, 1909, the clerk to the Commissioners of Income Tax for Kensington served on the applicant notice of the additional first assessment in respect of such profits on "foreign possessions" (No. 1 above mentioned) for the year 1907-8. On March 15, 1909, the applicant informed the said clerk by letter that the duty for the period applied for had already been paid to the collector for the district of the parish of Aldgate, in the city of London, on all his income under Sched. D. On May 26, 1909, the said Commissioners for Kensington issued a precept to the applicant requiring him to give particulars of the amount of the remittances to him or on his account to the United Kingdom during each of the three years ended respectively on April 5, 1905, April 5, 1906, and April 5, 1907, in respect of profits, interest, and partners' drawings from the business formerly carried on under the name of Aramayo, Francke & Co.; and subsequently the three assessments for the years ending April 5, 1909, April 5, 1910, and April 5, 1911, respectively (numbered 2, 3, and 4 above mentioned), were made upon the applicant. Upon April 29, 1911, the clerk to the said Commissioners issued a notice of the additional first assessment (No. 5 above mentioned) for the year ending April 5, 1908, being in addition to the assessment No. 1 above mentioned. In December, 1910, a distress was levied

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for the sum of 1000*l.* in respect of the assessment (No. 1 above mentioned) for the year ending April 5, 1908, and this sum was paid under protest. The affidavit further stated that "the whole of the profits from such foreign possessions are and have always been received in the city of London and not elsewhere, and to the best of my information and belief it has not been alleged by any person, nor is it the fact, that the said Felix Avelino Aramayo has received any profits from foreign possessions nor any other profits on which such assessments could be based since January 12, 1907."

The applicant did not appeal to the general Commissioners against any of the above assessments. In his original returns to the Kensington Commissioners the applicant had returned "nil" in respect of "foreign possessions."

The affidavit of the surveyor of taxes for the parish of South Kensington, in which 102, Cromwell Road was situated, for the period from January 1, 1909, to April 1, 1909, stated that it came to his knowledge in the course of his official duties that the said firm of Aramayo, Francke & Co. sold their business carried on in Bolivia and elsewhere as from May 31, 1906, to the above-mentioned limited liability company, whose capital then was 500,000*l.* divided into 50,000 shares of 10*l.* each, and that of the consideration paid by the company for such business the applicant received fully-paid shares to the value of 138,380*l.*, the sale being completed and the transfer effected (as appeared from the affidavit in support of the rule) on January 12, 1907; that the first balance-sheet of the company filed with the Registrar of Companies and issued in June, 1908, shewed that a profit of over 125,000*l.* had been made for the year; that the company were duly assessed for the period from January 12 to April 5, 1907, and for the following years; that from the size of the business taken over by the limited liability company the profits up to the date of transfer could not have been ascertained and remitted at once, but that such ascertainment, realization, and remitting must have taken considerable time; and that he was satisfied that this was a case for an additional first assessment, and the additional Commissioners accordingly made the assessment (No. 1 above mentioned) for the

year ending April 5, 1908, in the sum of 20,000*l.* in respect of profits and gains arising from "foreign possessions." The affidavit of the surveyor of taxes for South Kensington from November 11, 1909, stated that from certain information and in view of the fact that the applicant had not denied the receipt of income from foreign possessions, but had merely stated that the duty had been paid in the city of London on all his income under Sched. D, it appeared to him that the applicant was still in receipt in the United Kingdom of profits and gains from foreign possessions, and the additional Commissioners accordingly made the assessments (Nos. 2, 3, 4, and 5) upon him in respect of remittances from foreign possessions.

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The affidavit of the surveyor of taxes for the district of the city of London, in which 52, Billiter Buildings was situated, for the period from July 16, 1907, to November 1, 1909, stated that in consequence of a communication from the surveyor of taxes for South Kensington in April, 1909, stating that the applicant alleged that he had paid income tax to the Aldgate collector on all his income under Sched. D, he made inquiries and found that the only assessments for some years had been assessments under Sched. D each year on the said firm of Avelino Aramayo & Co. in respect of their profits, and also in the year ending April 5, 1908, an assessment under Sched. E on the applicant in respect of his fees as a director of Aramayo, Francke & Co., Limited, and one on the said limited company under Sched. D for the year ending April 5, 1908, in respect of their profits, and that there were no assessments on the applicant individually except the said assessment under Sched. E; and so far as he could ascertain no payments had been made other than in respect of the above-mentioned assessments, and he reported the fact to the surveyor at Kensington; and he was unable to discover that any returns had been made by the applicant in respect of foreign possessions.(1)

Sir John Simon, S.-G., and W. Finlay, for the surveyor of taxes, shewed cause. With regard to the assessment No. 1,

(1) The Court refused to give leave to read an affidavit made by the applicant's solicitor in reply.

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namely, that for the year ending April 5, 1908, to the amount of 20,000*l.*, the amount due thereunder, 1000*l.*, has been paid upon a distress being levied, and the Commissioners have received the money. Prohibition will not lie against them to prohibit them from proceeding on an assessment when there are no more proceedings which they can take. There is therefore nothing to prohibit. Further, with regard to the four assessments, Nos. 1, 2, 3, and 4, the first was made on February 25, 1909, and the other three were made on October 14, 1910. All these assessments were made more than six months before the rule in this case was applied for, and therefore s. 1 (a) of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), applies and is a bar to these proceedings. A rule for a prohibition is a "proceeding" within the meaning of that section, and the General Commissioners for the Purposes of the Income Tax Acts are persons acting "in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority." The applicant resided at 102, Cromwell Road, within the jurisdiction of the general Commissioners for Kensington, and the Commissioners acted, at any rate, in intended execution of the Income Tax Acts.

Next, with regard to the grounds upon which the rule was granted, the Court cannot go into the question whether the applicant has or has not in fact received in this country any profits or gains arising from foreign possessions; that would be a matter of appeal to the general Commissioners from the assessments and not of prohibition. The only question is whether the additional Commissioners had jurisdiction to make the assessments. Grounds 1 and 2 are therefore matters for appeal and not for prohibition. With reference to ground 3 it is admitted that the applicant is resident in Kensington, but it is said that under s. 108 of the Income Tax Act, 1842, the jurisdiction to assess him in respect of foreign possessions is vested solely in the Commissioners acting for the city of London. The scheme of the Act of 1842 must be looked at. Sect. 4 provides for the appointment of Commissioners for the general purposes of the Act; and s. 16 provides for the appointment by the general Commissioners of additional Commissioners. By s. 47

the assessors appointed under the Act are to affix general notices on or near to the church doors requiring persons to make out and deliver to the assessors or the Commissioners declarations and statements as to their income, and "such general notices shall . . . be deemed sufficient notice to all persons resident in such city, town, parish, or place"; and s. 48 provides that a particular notice requiring a declaration and statement shall be given to every person chargeable to the duties or left at his dwelling-house or place of residence, and if such person shall refuse or neglect to make such declaration or statement within the time limited in such notice he shall be liable to a penalty, and the Commissioners shall proceed to assess or cause to be assessed every person making such default. By s. 52 the person chargeable is to prepare and deliver to the person appointed to receive the same a true and correct statement in writing of (inter alia) "the amount of the profits or gains arising to such person from all and every the sources chargeable under this Act, according to the respective schedules thereof." The statement therefore must include profits or gains from foreign possessions within Sched. D, s. 100, case 5, under which the assessments in question were made, and the jurisdiction to assess is given to the Commissioners of the place where the taxpayer resides. No point is made in the rule that the applicant ought, under s. 106, to have been assessed in the city of London because he carried on trade there; the point made is that under s. 108 he must be assessed on the profits or gains from "foreign possessions" by the Commissioners acting for the city of London where they were received. Sect. 108 provides that the duty to be assessed in respect of the profits or gains arising from foreign possessions "may be stated to and assessed by the respective Commissioners acting for" London, Bristol, Liverpool, and Glasgow. Those words are permissive and not obligatory. They give an option to the taxpayer, if he chooses to avail himself of it, of making his statement to the Commissioners acting for one of those places instead of to the Commissioners at his place of residence. It is for the convenience of the taxpayer. The subsequent words, "and such duty shall be stated to and assessed and charged by the Commissioners," only impose a duty upon those Commissioners if the person chargeable

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1913 <hr/> REX v. KENSINGTON INCOME TAX COMMISSIONERS.	has elected to make his statement to them. It may be for the convenience of a person receiving the produce of foreign possessions to have the duty thereon assessed at one of the specified ports where such produce is imported, and s. 108 gives him that option. If he exercises the option the Commissioners shall assess him. That section does not give the jurisdiction to assess solely to the Commissioners acting for one of those places; the Commissioners of the place where the taxpayer resides (apart from any question under s. 106, which is not raised here) have also jurisdiction to assess, but the taxpayer may elect to be assessed at one of the above-named places appropriate to his case. Sect. 110 shews that the Commissioners for Kensington may require the taxpayer to make a return for Kensington, if he resides there. That ground therefore fails.
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With regard to ground 4, the assessment was "made" on March 31, 1911, when it was made by the additional Commissioners, within the meaning of s. 52, sub-s. 2, of the Taxes Management Act, 1880, and not when it was allowed and confirmed on May 25, 1911, by the general Commissioners. It was therefore made within the three years after the expiration of the year of assessment allowed by s. 23, sub-s. 2, of the Finance Act, 1907, namely, within three years from April 5, 1908. The period specified is a period within which the additional Commissioners have power to make an additional first assessment; if it is made by them within that period, it may be confirmed by the general Commissioners after the expiration thereof. The assessment is for the year ending April 5, 1908, though the profits or gains of that year may have to be assessed under s. 100, case 5, and s. 190, Sched. G, r. xi., of the Income Tax Act, 1842, on the average of the three preceding years. Sect. 111 of the Act of 1842 speaks of the additional Commissioners directing "an assessment to be made," and under s. 112 the surveyor, if he is dissatisfied with the assessment, may bring it before the general Commissioners for their opinion, and according to such opinion the assessment shall be altered or confirmed. Sect. 113 also provides that the additional Commissioners shall in certain events "make" an assessment. Sects. 114,

115, 116, and 117 also speak of assessments "made" by the additional Commissioners. By s. 118 any person aggrieved by an assessment "made by the said additional Commissioners," or by any objection to the assessment by the surveyor, may appeal to the Commissioners for general purposes in the district where the assessment was made. Therefore the general Commissioners only act upon objection by the surveyor or upon appeal from the additional Commissioners, and on such objection or appeal they may, by s. 122, confirm or alter the assessment. The additional Commissioners "make" the assessment, and the general Commissioners "confirm or alter" it. The assessment therefore was "made" within three years after the year of assessment. The rule therefore fails upon all points.

A. M. Bremner, for the general Commissioners for Kensington.

Dankwerts, K.C. (*Edwardes Jones* with him), in support of the rule, applied for leave to amend the rule by inserting as an additional ground that under s. 106 of the Income Tax Act, 1842, the applicant could only be assessed by the Commissioners for the city of London where he carried on business. It is not admitted that it is necessary to state the grounds in the rule, and even if it is necessary ground 3 sufficiently raises the point under s. 106. Sects. 106 and 108 must be read together. The applicant, however, for greater safety applies for leave to amend.

Sir John Simon, S.-G., contra. The matter is purely technical and leave ought not to be given.

BRAY J. We are all agreed that leave to amend should not be given. The applicant is still at liberty to argue that he is not bound by the grounds stated in the rule.

Dankwerts, K.C., and *Edwardes Jones*, in support of the rule. With regard to the contention that the Public Authorities Protection Act, 1893, applies, an application for a writ of prohibition is not a "proceeding" within the meaning of s. 1 of that Act. That section contemplates an action, prosecution, or proceeding by some one who is injured by some act done in pursuance, or execution, or intended execution of an Act of Parliament or of any public duty or authority. A prohibition is

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a proceeding for the purpose of preventing an encroachment upon the prerogative of the Crown by keeping inferior tribunals within their jurisdiction: *Worthington v. Jeffries*. (1) Any one may call the attention of the Court to the excess of jurisdiction, and it is for the Court to act. Proceedings in quo warranto are not within the Act: *Rex v. Carter*. (2)

With regard to s. 108 of the Income Tax Act, 1842, that Act is a re-enactment with additions of the Income Tax Act, 1806 (46 Geo. 3, c. 65), the latter part of s. 117 being the corresponding enactment to s. 108 of the Act of 1842. Sect. 108 must therefore be construed in the light of the state of affairs existing at the beginning of the nineteenth century. At that time all foreign produce was imported into certain ports, and the Income Tax Commissioners at those ports would be likely to have knowledge of it. The object of the enactment was to enable the Commissioners to tax the income at the place of entry, in other words, at its source, and not to give the subject the right to elect where he would be taxed. The words "may be stated to and assessed by" the Commissioners acting for the respective ports, which occur in both Acts, were inserted for the purpose of giving jurisdiction to those Commissioners. The word "may" is an apt word to confer a power or jurisdiction: *Julius v. Bishop of Oxford*. (3) The Commissioners have jurisdiction to receive the statement, and having that jurisdiction the section says that they shall assess. "Such duty shall be stated to and assessed and charged by the Commissioners acting for" such of the said places at or nearest to which such property shall have been first imported, or the person who shall have received such remittances, money, or value from thence, and arising from property not imported as aforesaid, shall reside. If the produce or the profits or gains arising from foreign possessions are imported partly into the port of London or are received partly in the city of London "the whole of the duty chargeable in respect of such produce, profits, or gains so imported or received shall be assessed and charged by the Commissioners acting for the said city of

(1) (1875) L. R. 10 C. P. 379, at pp. 381, 382.

(2) (1904) 68 J. P. 466.

(3) (1880) 5 App. Cas. 214.

London, and not elsewhere." The section gives jurisdiction to the Commissioners, who being Commissioners at the port or place of entry presumably know more about the matter than Commissioners at an inland place, to receive the statement, and then proceeds to impose an absolute duty upon them to exercise the jurisdiction and to assess. The words "may be stated to" may refer to a statement by the assessor or surveyor. The Act contains provisions for a general and a particular notice being given to all persons chargeable, and every such person is bound to make a return of all his income, including that derived from foreign possessions. By s. 110 he must make a return, if required by the respective Commissioners, in the place where he resides and also in the place where he carries on his business, but there is not to be a double assessment. The sections of the Act when read together shew that in the case of foreign possessions and the other possessions mentioned in s. 100, case 5, the jurisdiction of the Commissioners of the place where the taxpayer resides, in this case Kensington, is excluded, and by s. 108 the Commissioners acting for one of the places mentioned, in this case the city of London, alone have jurisdiction and are bound to assess. Even though the return is made in Kensington the person chargeable is bound to be assessed in the city of London. As appears from paragraph 1 of the case in *Brown v. Burt* (1), the Commissioners acting for the city of London do make assessments under s. 108 in respect of foreign possessions without a statement being delivered to them by the taxpayer, even though the latter does not reside or carry on business in the City. The writ of prohibition therefore ought to issue upon this ground.

Next, the fact that assessment No. 1 has been paid under protest does not take away the right to prohibition. Where the want of jurisdiction appears upon the face of the proceedings the Court is bound to issue a prohibition even though the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior Court: *Farquharson v. Morgan*. (2) It will be issued even after judgment. The reason is that if the

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(1) (1911) 105 L. T. 420 ; 5 Tax Cases, 667.

(2) [1894] 1 Q. B. 552.

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case were allowed to stand it might become a precedent. The patent defect here is that the assessments by the Kensington Commissioners are stated on their face to be in respect of foreign possessions.

[AVORY J. referred to *Chabot v. Lord Morpeth*. (1)]

That was a case where the judgment was good on its face. Next, the assessments Nos. 1, 2, 3, and 5, which are additional first assessments, were made under s. 52 of the Taxes Management Act, 1880. The whole section is governed by the words "If the surveyor discovers." That is a condition precedent to the operation of the section. The discovery cannot properly be made unless the surveyor has legal evidence that there are profits which have not been taxed. There must be proper evidence that there were taxable profits which were remitted to this country. Further, there must in fact be assessable profits. In the present case there were no such profits. This is clear from the affidavit in support of the rule, and the affidavits filed in opposition do not displace the facts deposed to in the former affidavit. There was therefore no subject-matter of assessment, and prohibition will lie, the remedy by appeal in such a case not being the only remedy: *Charleton v. Alway* (2); *Attorney-General v. M'Cormack*. (3) The former of the two cases refers to land tax, but there is no difference in this respect between land tax and income tax. It is a condition precedent to the right to assess that there should be assessable profits. This point is covered by the first ground in the rule. [*Rex v. General Commissioners of Taxes for Clerkenwell* (4), *Rex v. Commissioners of Income Tax for London* (5), *Allen v. Sharp* (6), and *New South Wales Taxation Commissioners v. Adams* (7) were also referred to.]

Next, as stated in the second ground in the rule, the whole of the profits were received before April 5, 1907, and therefore could not, under s. 52 of the Taxes Management Act, 1880, legally have been assessed later than four months after the expiration of the year of assessment, and even if the assessment had been

(1) (1844) 15 Q. B. 446.

(4) [1901] 2 K. B. 879.

(2) (1840) 11 Ad. & E. 993.

(5) (1904) 91 L. T. 94.

(3) [1903] 2 I. R. 517, at p. 520.

(6) (1848) 2 Ex. 352.

(7) [1912] A. C. 384.

under s. 63 not later than April 5, 1908. Sect. 23, sub-s. 3, of the Finance Act, 1907, could not apply so as to extend those times because the applicant might have been assessed in respect of those profits under the Finance Act, 1906, s. 23, sub-s. 3, of the Finance Act, 1907, providing that " nothing in this section shall . . . extend the time during which any assessment may be made or amended or a charge may be made on any person in respect of income tax charged under any Act passed before the commencement of this Act." [*Maughan v. Edinburgh and District Water Trust* (1) was referred to.]

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Sir John Simon, S.-G., in reply upon the last points. By s. 111 of the Income Tax Act, 1842, where the additional Commissioners are satisfied with the statement made by the person chargeable, and no objection is made thereto by the surveyor, " which he is hereby empowered to make for sufficient cause," they shall direct an assessment to be made on such statement. By s. 113, where the person chargeable has made default in delivering a statement, or if the additional Commissioners are not satisfied with the statement delivered, the said Commissioners shall make an assessment " according to the best of their judgment," the assessment being subject to appeal. This relates to the first assessment. It need not be based on legal evidence. The Act contains no machinery for obtaining such evidence. The additional Commissioners cannot administer an oath. By s. 52 of the Taxes Management Act, 1880, " if the surveyor discovers " that the first assessment is inaccurate, the additional Commissioners shall make an additional first assessment " in such sum as according to their judgment ought to be charged," such assessment being subject to objection by the surveyor and to appeal. The language used is similar to that used in the case of the first assessment. Like the first assessment it need not be made upon legal evidence that certain property has been omitted from the first assessment. The surveyor does not act capriciously, but his action need not be founded on evidence in the strict sense of the word. Here again as in the case of the first assessment there is no machinery by which legal evidence can be obtained. " Discovers " in s. 52 means " has reason to believe." It does not mean

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"knows as a fact." Up to this point there is no judicial determination of the matter. It is not until an appeal is brought that evidence in the strict sense can be obtained. Sects. 118—126 of the Act of 1842 and s. 57 of the Taxes Management Act, 1880, give a person aggrieved by any assessment a right of appeal to the Commissioners for General Purposes and prescribe the procedure to be followed on the appeal. The appeal is a judicial hearing, and the Commissioners have power to examine witnesses on oath and to require particulars in writing of the income of the person chargeable, and they come to a judicial determination, and their decision is by s. 57, sub-s. 10, of the Act of 1880 final, subject to a case being stated for the opinion of the High Court. The assessment before appeal is merely an "administrative assessment": *In re Calvert, Ex parte Calvert* (1); and the additional Commissioners have jurisdiction to determine what are the profits and prohibition will not lie: *Rex v. General Commissioners of Taxes for Clerkenwell*. (2) The surveyor here was not satisfied with the applicant's return of "nil" in Kensington, and the additional Commissioners had power to make the assessments.

BRAY J. In this case a rule has been obtained for a writ of prohibition to prohibit the General Commissioners of Income Tax for Kensington from proceeding on any one of five several assessments to the income tax under Sched. D in respect of profits of foreign property. The rule was granted upon certain grounds, and we must look at those grounds alone because they are the only grounds upon which the rule was obtained. I propose to deal with each of them in order. The first ground is that the property from which such profits were derived had been wholly transferred away from the said Felix Avelino Aramayo and such profits had wholly ceased before April 6, 1907, the commencement of the first of the said years of assessment, and no part of the profits on which such assessments purported to be based was received nor was any part alleged to have been received during any of the years of assessment. That raises a wide question, because it

(1) [1899] 2 Q. B. 145, at p. 147.

(2) [1901] 2 K. B. 879.

practically asks us to declare that in every case of these assessments, where a writ of prohibition is applied for and there is a denial on oath that there were any profits to be taxed, the Court is bound to issue the writ unless there is evidence to the contrary. That means that the Court has to try the question whether or not there were any profits. As I understand the argument, it is said that the case is like assessments to land tax or to poor rate, where it has been held that prohibition will lie if the land is not subject to land tax or if the person assessed to the poor rate does not occupy. But the reason for those decisions is that there is no jurisdiction to assess in such cases. That depends upon the construction of Acts applicable thereto, and the present case equally depends upon the construction of the Acts applicable to it. It is further said in connection with the same matter that the surveyor of taxes had in this case no power to put the additional Commissioners in motion.

This brings me to the consideration of s. 52 of the Taxes Management Act, 1880. I do not wish to express any opinion as to whether prohibition will lie. I do not wish to decide that question one way or the other. I will assume for the purposes of this case that prohibition would lie, and we have accordingly to consider what are the circumstances in which the surveyor can under s. 52 of the Act of 1880 put the additional Commissioners in motion, because in my view the fair construction of the section is that when the surveyor "discovers" what is there mentioned he has to communicate with the additional Commissioners, who then act in the matter.

That raises an important point, because the greatest difficulty will arise if the contention put forward on behalf of the applicant is correct that the surveyor can only put the additional Commissioners in motion if he has ascertained on legal evidence that there are profits which have been omitted from the first assessment or that the assessment is otherwise incorrect. If that were true it would be most difficult for the surveyor ever to put the additional Commissioners in motion, and if the additional Commissioners could not be put in motion the machinery by which the taxpayer is eventually bound to give evidence on oath and to disclose the particulars of his income

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before the general Commissioners if and when he appeals would be seriously affected.

It is not unimportant in dealing with this question to consider the earlier sections of the Act of 1842. The Solicitor-General has already called our attention to them, and it is not necessary for me to go through them again. They shew that the scheme of the Act is this. First of all the taxpayer receives a notice, either a particular or a general notice, that he is to make a return, and that return is submitted to the assessors, and it then comes before the additional Commissioners. Before, however, it is dealt with by the Commissioners the surveyor has a right to examine it and make objections if he thinks fit; and eventually the Commissioners make an assessment. The surveyor or the subject may appeal from that assessment, and then it comes on for hearing before the general Commissioners, when the parties may appear. That is the general scheme of the Act of 1842, and there is nothing in the procedure under the Act which can be said in any way to oblige the surveyor to produce legal evidence in support of his objection. So far I have dealt with a first assessment. But what was done in this case, so far as material to this question, was not done under the Act of 1842, but under the Taxes Management Act, 1880. By s. 50 of the latter Act, "(1.) In case the assessor does not receive a return from a person liable to be charged to the duties, he shall to the best of his information and judgment (b) estimate the amount at which every such person ought to be charged in respect of the duties under Schedule D of the Income Tax Acts, returning to the Commissioners the name and residence of every such person and any other particular the Commissioners may require. (2.) On the delivery to the general Commissioners by the assessor of any certificates of assessment and of estimate, and their acceptance thereof, they shall forthwith deliver the same to the surveyor for examination." By s. 51, sub-s. 1, "The surveyor may inspect and examine every return, and also every first assessment of the duties, made for any parish for any year, as well before as after the respective Commissioners sign and allow such first assessments." I come to s. 52, and I will assume that the requirements of this

section are a condition precedent to the exercise of jurisdiction on the part of the additional Commissioners, and if the condition precedent has not been fulfilled prohibition will lie to restrain further proceeding on any assessment made by the additional Commissioners under that section. That section provides: "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, or has obtained and been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorized by the Tax Acts," then by sub-s. 2 the additional Commissioners shall make an additional first assessment on any such person in such sum as according to their judgment ought to be charged on such person, subject to objection by the surveyor and to appeal. The question which we have to consider is what is the meaning of the word "discovers." That word obviously has more than one meaning, and the question which we have to consider is what meaning it has in this section. Does it mean, as contended by the applicant, ascertain by legal evidence? In considering that question it is necessary to bear in mind the relevant provisions of the Acts of 1842 and 1880. First of all, has the surveyor any right given to him to obtain legal evidence? I cannot find that he has any such right. He has no right whatever to examine the taxpayer on oath, or to require him to give the particulars of his profits and gains and to verify the same, or to call upon any one in his service to answer questions. It would therefore seem most unlikely that the Legislature should have intended by the word "discovers" that the surveyor was to ascertain by legal evidence. The Act provides for a later trial, if I may call it so, of the question if and when there is an appeal. The stage preceding an appeal is not that at which legal evidence is required, and it seems to me to be clear that the word "discovers" cannot mean ascertains by legal evidence. In my opinion it means comes to the conclusion from the examination he makes and from any information he may choose to receive. There is nothing to prevent him from

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getting such information as he can. What did the surveyor do here? As I understand the affidavits, substantially what he did was this. In 1909 he ascertained the existence of a company, and that towards the end of 1906 an agreement had been made for the transfer to the company of the assets and goodwill of a business carried on in Bolivia by a firm in which the applicant was one of the partners. He therefore discovered that the applicant had been carrying on a business in Bolivia down to some time late in 1906. He discovered from the consideration which the applicant was to receive under the agreement for the transfer of the business, namely, 138,380*l.* in shares of the company, that it must have been a profitable business. He found that the applicant had made no returns in respect of foreign possessions. He accordingly wrote to the applicant in February, 1909, and received what I cannot help thinking was an evasive answer, and I am not surprised that he came to the conclusion that he was not satisfied and that there must be such profits. He thought that it was almost certain that some of the profits from that business would be coming over here in 1907, and the applicant would be assessable at all events in respect of those profits. In order to see what the proper assessments should be he would have to go back for three years and take the average profits, and, in all the circumstances, if I had been the surveyor I think that I should have come to the conclusion that it was extremely likely that there were profits which the applicant ought to have returned. It seems to me therefore that the surveyor on the evidence before him bona fide discovered that the applicant had not made a full and proper return of his receipts from foreign possessions, and that being so, on communicating that fact to the additional Commissioners they would have the right to make an additional first assessment in such a sum as according to their judgment ought to be charged on such person subject to objection by the surveyor and to appeal. Therefore the first point fails.

The next ground stated in the rule is that the whole of the profits on which such assessments purported to be based were received prior to April 5, 1907, and might have been assessed prior to the commencement of the Finance Act, 1907, and therefore could not legally be assessed later than April 5, 1908. That

seems to me to be founded upon a complete misconception. The surveyor did not discover that there were profits in 1905, 1906, and 1907. What he discovered or came to the conclusion was that there were profits in the taxable year, the year ending April 5, 1908, and he only proposed to estimate this sum on the three years' basis. That point fails in fact.

The third ground is that the whole of the profits on which such assessments purported to be based were profits or gains arising from foreign possessions, and were received in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842, assessable by the Commissioners acting for the city of London, and not elsewhere. I assume again, without deciding it, that if that be true prohibition will lie. What is the meaning of that ground? It means that s. 108 is not optional, as the Solicitor-General contends, but is compulsory; that in a case where a person is charged with duty in respect of foreign possessions, supposing certain of the profits are received in London, he can only be charged by the Commissioners acting for the city of London and not elsewhere. In my opinion it raises no point upon any section other than s. 108, and, except for the purpose of interpreting s. 108, we have nothing to do with s. 106. It was in order to meet that difficulty that we were asked to amend by adding to the grounds stated in the rule a further ground that by virtue of s. 106 the profits were assessable only by the Commissioners for the city of London. We refused that application for this reason, that the point has no merits. The applicant thinks that he has discovered that the Commissioners have made a blunder. It makes no difference by whom the profits are assessed. The applicant is entitled to rely upon any point properly taken in the rule, but if he has not taken the point I do not think that we ought to help him, especially in a case where in regard to one of the assessments he has submitted to pay, it is true, under protest, and where in none of them has he taken advantage of his right of appeal to the general Commissioners, by whom he would have received a perfectly fair hearing. Therefore I am not going to say whether the suggested point under s. 106 is a good one,

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namely, that under that section the additional Commissioners for Kensington had no right to assess him. I am merely going to deal with the point whether s. 108 prohibits any body except the Commissioners for the city of London from assessing him, and I do not intend to deal with s. 106 except so far as may be necessary for interpreting s. 108. Sect. 47 provides for a general notice being given requiring persons resident in the parish to deliver a declaration and statement as to their income, and s. 48 provides for a special notice being given to each person chargeable or left at his dwelling-house or place of residence; and s. 49 provides that the declaration and statement shall be delivered to the assessor of the same parish or place. Therefore a person living in Kensington has a general and a special notice, and it becomes his duty to make a declaration and statement, and by s. 52 the statement is to include the amount of the profits or gains "arising to such person from all and every the sources chargeable under this Act." It is clear, therefore, that the statement has to include profits or gains from foreign possessions. Under that procedure it is the duty of the person chargeable to make a return. I understand that the applicant did make a statement in Kensington that he had nothing to return from foreign possessions. I now turn to a later part of the Act. Sect. 106 specifies the districts in which the duties are to be charged. The section apparently, though I do not decide it, is exhaustive and compulsory. The words are "shall be" charged, or in one case chargeable. That is important because in s. 108 the language is altered. If it stood there it seems to me that s. 106 would settle once for all where a person is to be charged, and we should have to look at that section alone to see where he ought to be charged. But then comes s. 108, which says that "the duty to be assessed by virtue of this Act in respect of the profits or gains arising from foreign possessions or foreign securities, or in the British plantations in America, or in any other of Her Majesty's dominions, may be stated to and assessed by the respective Commissioners acting for the respective places hereinafter mentioned, videlicet, London, Bristol, Liverpool, and Glasgow, according to the regulations hereinafter mentioned, as if such

duty had been assessed upon the profits or gains arising from trade or manufacture carried on in such places respectively." Sect. 108 seems to be in the nature of a proviso on s. 106, and, as I read it, it gives an option to the taxpayer alone. "The duty may be stated to and assessed by" &c. It is to be stated to the Commissioners, therefore it cannot be a statement by them. There is nothing said about the surveyor, and therefore it does not mean that it is to be stated by the surveyor. "Stated" refers to the words which are constantly used in the Act requiring a statement to be delivered. In my opinion it means stated by the taxpayer. He is to have the privilege of being assessed by the persons who will presumably know most about the matter. If it stood there the section would be perfectly clear. The section is not compulsory; it simply gives an option to the taxpayer. I may say before passing on that the words "the duty to be assessed . . . may be stated to and assessed by" certain Commissioners are not perhaps quite accurate. In my view they mean a statement of the profits or gains, on which the duty is to be assessed, may be made to those Commissioners. There are, however, some subsequent words in the section which are relied upon in support of the applicant's contention: "and such duty shall be stated to and assessed and charged by the Commissioners acting for such of the said places at or nearest to which such property shall have been first imported into Great Britain," and so on. The reason of that is this. In the first part of the section the words are "may be stated to and assessed by the respective Commissioners acting for the respective places hereinafter mentioned." That leaves it quite vague to which set of Commissioners the taxpayer may make his statement and by which set he can be assessed, and so it is provided that it is to be done "according to the regulations hereinafter mentioned." The words "and such duty shall be stated to and assessed and charged by the Commissioners acting" &c. contain the regulations, and they are merely regulations specifying at which of the places mentioned the taxpayer is to deliver his statement if he exercises the option given to him. That is all. The rest of the section contains provisions dealing with that matter. For instance, the taxpayer must not send the statement to the Commissioners for

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Bristol if the profits or gains are received in or imported into Scotland, nor to the Commissioners for Glasgow if the profits or gains are received in or imported into Bristol; but if part is received in or imported into London the whole must be assessed and charged by the Commissioners for the city of London, and if the profits or gains are received in or imported into two of the places neither of which is London the assessment must be where the greater part is received or imported. These provisions are merely regulations for carrying out the option given to the taxpayer by the first part of the section. In my opinion, therefore, unless the taxpayer had in this case exercised his option by delivering the statement to the Commissioners for the city of London, there is no obligation upon those Commissioners to assess him, and no exclusive jurisdiction is given to them. It is not unimportant to point out that in s. 109 the language is again changed, because it enacts that "the profits arising from the docks called the London Docks, the East and West India Docks, and Saint Katherine Dock respectively, situate in the county of Middlesex, shall be assessed by the Commissioners acting for the city of London," and there are a number of other provisions where "shall" is used. I infer from the change in language that by the word "may" in s. 108 the Legislature intended to give an option and nothing more. The third ground therefore fails.

The fourth ground only applies to one assessment, that is, the further additional first assessment, No. 5, for the fiscal year ending on April 5, 1908. The point raised is that the assessment was not "made" until May 25, 1911, and that that was more than three years after the expiration of the fiscal year. If that is made out, it is a good point. The question depends upon s. 52, sub-s. 2, of the Taxes Management Act, 1880, as extended by s. 23, sub-s. 2, of the Finance Act, 1907. Sect. 52, sub-s. 2, provides that "As regards the duties chargeable under Schedule D of the Income Tax Acts, the additional Commissioners shall at any time after the said first assessments have been signed and allowed, but within four months after the expiration of the year to which such first assessments relate, make an assessment on any such person in an additional first assessment

in such sum as according to their judgment ought to be charged on such person, subject to objection by the surveyor and to appeal." Sect. 23, sub-s. 2, of the Finance Act, 1907, provides that "the time during which an assessment may be amended or an additional first assessment made under section 52 of the Taxes Management Act, 1880 . . . shall be any time within the year of assessment or within three years after the expiration thereof." That section extends the time within which an additional first assessment can be made under s. 52 of the earlier Act. Sect. 52 says that the additional Commissioners are to "make" the additional first assessment, and they made it on March 31, 1911, within three years after the year of assessment. The fact that it was signed and confirmed by the general Commissioners on May 25, 1911, after the expiration of the three years, does not alter the date on which it was made. This point also fails, and the rule must be discharged.

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AVORY J. I am of the same opinion. In the view which we take upon the main question it is not necessary, as my Lord has said, to decide whether prohibition will lie in this case; but speaking for myself I wish to express the opinion that prohibition would not lie at this stage, on the ground that the general principle is that the proceedings to be prohibited must be of a judicial and not of an executive character. As Lord Campbell C.J. said in *Chabot v. Lord Morpeth* (1), "Were we to grant a prohibition against this measure, we should be interfering with proceedings not judicial, but belonging to the Executive Government of the country."

I will first deal with preliminary matters which are not the points of substance in the case. With respect to the assessment No. 1 which was paid under protest I think it is clear that prohibition will not lie, there being no judicial proceeding either threatened or contemplated with regard to it. With respect to the assessment No. 5, I agree with my Lord that it was "made" within the meaning of s. 52 of the Taxes Management Act, 1880, when it was made by the additional Commissioners on March 31, 1911. There is nothing in s. 52 to shew that it is not made until

(1) 15 Q. B. 446, at p. 459.

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it is confirmed by the general Commissioners ; sub-s. 2 of that section says that the additional Commissioners shall " make " an additional first assessment, subject to objection by the surveyor and to appeal. There is one other matter which I think requires notice before I come to the main points in the case. It is the point under the Public Authorities Protection Act, 1893. It is not necessary to decide that point, but I wish to say that I entertain considerable doubt whether the Commissioners for the General Purposes of the Income Tax Acts come within the Act, and, further, whether prohibition is a proceeding within the meaning of that Act.

There are two main points of substance in the case. One is whether s. 108 applies so as to make it compulsory on the Commissioners for the city of London to make the assessments on foreign possessions. I agree with the judgment of my Lord that the section confers an option. The whole scheme of the section is to give an option to the taxpayer to have the assessment made at the appropriate place there mentioned. If it were necessary to consider and to pronounce a judgment on s. 106, I think it would be worthy of notice that, whereas a householder, not being a person engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, is to be charged to the duties by the Commissioners acting for the parish or place where his dwelling-house is situate, the section goes on to provide that " every person engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, shall be chargeable by the respective Commissioners acting for the parish or place where such trade " or other occupation shall be carried on or exercised. The section changes the wording from " shall be charged " to " shall be chargeable." In all the other cases provided for by that section where the taxpayer is neither a householder nor engaged in trade, &c., the words used are " shall be charged," so that it is compulsory in the case of every person who is not engaged in trade, &c. If he is engaged in trade or one of the occupations mentioned, then I read the section as meaning that he may be assessed and charged in the parish or place where the trade or other occupation is carried on ; and it would also have

been necessary, if we had to determine the case upon that section, to look at s. 110, which provides for the case of a man who is carrying on a trade or occupation in a place different from that in which he resides. In such a case he may be required to make a return in both places, and it would appear to follow that, if he may be required to make a return in both places, the Commissioners of either place may proceed to make an assessment upon him in default of his making a return. I have, however, only thrown out these considerations which might have to be applied if we had been called upon to determine this case under s. 106, but for the reasons which have been given we are not called upon to determine it. We have only to determine the point raised upon s. 108.

The other point of substance is as to the meaning of the word "discovers" in s. 52 of the Taxes Management Act, 1880. In my opinion the word means "has reason to believe." If it is construed in that sense it is consistent, and only in that way is it consistent, with the whole scheme of this legislation. Sect. 48 of the Income Tax Act, 1842, provides for a notice being delivered at the taxpayer's dwelling-house requiring him to make a return of his income, and it concludes with these words: "The said Commissioners shall moreover proceed to assess or cause to be assessed every person making such default in the manner herein directed." I think that the whole scheme of this legislation is that first of all persons have to make returns. If they do so, the surveyor and the Commissioners are not bound by those returns, and, if the Commissioners have reason to believe that they are incorrect, they may proceed to make an assessment upon that person, leaving him to his remedy by appeal if he is dissatisfied with the assessment which the Commissioners make. There is a provision in the Act of 1880 when dealing with appeals, namely, in s. 57, sub-s. 7, which says that "at every and any appeal the surveyor and assessor may then and there attend, and (a) give his reasons in support of the assessment," and he may "(b) produce any lawful evidence in support of such assessment." All these sections seem to me to point clearly to the fact that in s. 52 it is not a condition precedent to the exercise of the jurisdiction that the surveyor should be in possession of legal

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evidence of the inaccuracy of the assessment which has been made.

For these reasons I agree that the rule should be discharged.

LUSH J. I agree. First, with regard to s. 52 of the Taxes Management Act, 1880. If that section fetters the action of the surveyor and of the Commissioners as contended for by the applicant, that is to say, if it imposes as a condition precedent to the operation of that section an obligation on the part of the surveyor to obtain legal evidence that the return is defective, it is certainly remarkable that the statute which imposes that obligation contains no machinery for enabling the surveyor to obtain the evidence which it is said he must obtain before the jurisdiction under the section arises. He is not a judicial officer; he has no power to compel witnesses to give evidence, or to administer an oath if they are willing to give evidence. He has no means of obtaining that evidence without which, according to the contention, the jurisdiction does not arise. Further, it seems even more remarkable, if that is the true meaning of the section, that the fetter should be imposed upon the surveyor upon whom the section does not purport to confer any jurisdiction at all. The jurisdiction is conferred, not upon the surveyor, but upon the Commissioners under the later part of the section, and it is in that part of the section one would have expected to find the obligation to obtain legal evidence, if the section was intended to create it. Yet when the section deals with the action of the Commissioners there is not a word to suggest that they cannot act unless they are in possession of legal evidence. It seems to me to be impossible to say that the section fetters the power of the surveyor in the case of an additional first assessment when it is not suggested that there is any such fetter imposed upon him in the case of a first assessment. If we take "discovers" as I think it was intended to be taken, as equivalent to "finds" or "satisfies himself," the difficulty disappears. It means then that, if the surveyor finds that there has been a defect in the first return, he can take steps to remedy it by putting the additional Commissioners in motion, and then the whole of these sections

fall into line, and the action of the surveyor, after a return has been made, is precisely the same as it is before the return is made in the first instance.

With regard to s. 108 of the Income Tax Act, 1842, I only desire to say this. It is vital to the applicant's contention that the first part of the section which is permissive in form should be construed as mandatory; to put it in other words, that the words "may be stated" mean "must be stated." First of all, is there any ground for saying that what is apparently a permission given to the persons indicated in the section is something different from a permission—is in point of substance a mandate or command? It is clear to my mind that the words "may be stated" refer to the statement which has been mentioned in the earlier sections, namely, the statement by the taxpayer, and mean that the taxpayer may, if he pleases, make a statement to the Commissioners there mentioned. When one contrasts the permission in the first part of the section with the mandate given throughout the remainder of the section where the word "shall" is used, it seems to me to become quite plain that the word "may" indicates a permission and not a compulsory obligation. It is true that if jurisdiction is conferred on a judicial body by words permissive in character, that is a permission upon which it is the duty of that body to act, and in that way "may" has frequently come to mean "must"; but neither the taxpayer nor the persons who act upon his statement are acting judicially, and there is no ground for saying that the permission given in the first part of the section by the word "may" is a command and not a permission. If that is so, these assessments were made within the jurisdiction of those who made them, and even assuming that prohibition lies, which in my opinion is extremely doubtful, there is no ground for saying that the Commissioners have acted without jurisdiction.

Rule discharged.

Solicitors for applicant: *Dale & Co.*

Solicitor for surveyor of taxes: *Solicitor of Inland Revenue.*

Solicitors for Commissioners: *Shepheards & Walters.*

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Water — Supply — London — Building Operations — Supply by Measure — “Builder who shall require a supply” — Builder taking Water from Building Owner — Right of Water Board to charge — Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), ss. 16, 17.

By s. 16, sub-s. 1, of the Metropolitan Water Board (Charges) Act, 1907, dealing with “supply by measure,” the Board shall at the request of any owner or occupier of premises who requires for use on such premises a supply of water by measure for purposes other than domestic afford a supply of water by means of a meter or other instrument or apparatus. By s. 17, “Any builder being about to erect any building or part of a building who shall require a supply of water for that purpose shall be deemed to be the occupier of premises within the meaning and for the purposes of the section of this Act relating to ‘supply by measure’; Provided that, if the Board so determine, they may instead of affording the required supply by measure afford the same at a rate not exceeding seven shillings per hundred pounds of the probable total cost after making such allowance as the Board may think reasonable for decorative or iron or steel work not requiring the use of water.”

The plaintiffs, the Metropolitan Water Board, agreed with the Secretary of State for War to supply water by measure at certain rates to Hounslow barracks for domestic and non-domestic purposes. During the currency of the agreement the defendants, who were builders, under a contract with the Secretary of State for War erected an addition to the hospital quarters at the barracks, it being a term of the contract that water for the building operations might be obtained by the defendants free of charge from any available War Department source. The defendants took the necessary water from the supply at the barracks after it had passed through the meter and therefore after the Secretary of State for War had become liable to pay for it. The plaintiffs claimed to recover from the defendants, under s. 17 of the Metropolitan Water Board (Charges) Act, 1907, 14s., being 7s. per 100l. of the probable total cost of the building.

In December, 1907, the plaintiffs had passed a general resolution that, instead of affording supplies for building purposes under s. 17 by measure, such supplies should be afforded at the rate of 7s. per 100l. of the probable total cost of the building after making such allowance as by their appeal and assessment committee they might think reasonable for decorative or iron or steel work not requiring the use of water. The plaintiffs had not considered, in the case of the building erected by the defendants, whether any allowance should be made :—

Held, that the word “require” in s. 17 meant “demand” and not

merely "have need of"; that the defendants had not "required" from the plaintiffs within the meaning of s. 17 a supply of water for building purposes; and that therefore the plaintiffs were not entitled to recover the sum claimed.

Held, also, that, as the plaintiffs had not considered in the particular case whether any allowance should be made in respect of the matters referred to in the proviso to s. 17, the general resolution was not a sufficient "determination" by the plaintiffs so as to entitle them to charge the 7s. per 100l. of the probable total cost of the building.

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APPEAL from the decision of a Divisional Court (Channell and Avory JJ.) upon appeal from the Westminster County Court.

The action was brought in the Westminster County Court to recover, as stated in the summons, a "debt or claim, 14s.," the particulars of which were: "Amount due to the Metropolitan Water Board in respect of water used for building annexe to nursing sisters' quarters at the barracks, Hounslow, 14s." The plaintiffs claimed to recover the amount under s. 17 of the Metropolitan Water Board (Charges) Act, 1907 (1), as being calculated at the rate of 7s. per 100l. upon the probable total cost of the building.

On September 3, 1909, an agreement was entered into between the plaintiffs, the Metropolitan Water Board, and the Secretary of State for War (therein called the consumer)

(1) 7 Edw. 7, c. clxxi., s. 16 (the marginal note to which is "Supply by measure"): "(1.) The Board shall, at the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid, who requires for use on such premises a supply of water by measure for purposes other than domestic and by means of communication pipes and other necessary and proper apparatus to be provided, laid, and maintained by and at the cost of the person requiring such supply, afford a supply of water by means of a meter or other fit and sufficient instrument or apparatus . . . ,"

Sect. 17: "Any builder being about to erect any building or part of a building, who shall require a supply of water for that purpose, shall be deemed to be the occupier of premises within the meaning and for the purposes of the section of this Act relating to 'supply by measure'; Provided that if the Board so determine they may, instead of affording the required supply by measure, afford the same at a rate not exceeding seven shillings per hundred pounds of the probable total cost after making such allowance as the Board may think reasonable for decorative or iron or steel work not requiring the use of water,"

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for the supply of water by measure to Hounslow barracks. (1) Clause 1 provided that the Board would permit the consumer to take a supply of water from the Board's mains "for the premises and purposes specified in the schedule" thereto. In the schedule the premises to be supplied were stated to be "cavalry and infantry barracks, Hounslow," and the purposes of supply "domestic and non-domestic." By clause 2 the consumer was to pay to the Board the rates and charges and meter rent specified in the schedule, the rates specified being per thousand gallons. By clause 5, for the purpose of ascertaining the quantity of water supplied the Board were to provide and fix a meter, and if from any cause the meter should cease to register or should be proved to register incorrectly the quantity of water passing through it the Board should be entitled to make a fair and reasonable estimate of the quantity of water supplied, and the quantity so estimated was to be final and considered as having been registered by the meter; and subject as aforesaid, the register of the meter was in the absence of fraud to be conclusive evidence of the quantity of water supplied. By clause 6, "the consumer shall be responsible for all water after it has passed through the meter, and shall pay therefor under this agreement notwithstanding any loss by leakage, waste, or misuse." By clause 9, "the water supplied shall be used only for the purposes specified in the schedule, and for no other purpose whatsoever."

In March, 1911, during the currency of the agreement, the defendants, who were builders, entered into a contract with the Secretary of State for War whereby they agreed to execute such building works at Hounslow barracks according to certain prices as the Secretary of State for War might require during a period of three years from April 1, 1911; and it was a term of the contract that water for the works might be obtained by the defendants free of charge from any available War Department source. Under this contract the defendants were required to

(1) The agreement was on a printed form, and was stated to be the ordinary form of agreement with consumers under s. 24 of the Metropolitan Water Board (Charges) Act, 1907, for a supply of water by measure.

build two rooms as an addition to the nursing sisters' quarters in Hounslow barracks, and they obtained the water necessary for the building operations from the supply at the barracks after it had passed through the meter.

On September 21, 1911, the supervisor of the Metropolitan Water Board wrote to the defendants as follows :—

Dear Sirs,

“ Re Nurses' Quarters, Hounslow Barracks.

“ I am informed by the district engineer that you are using the Board's water for building purposes at the above-named site, and I shall be obliged if you will fill in and return the enclosed form of application for a building supply in order that an account may be prepared and sent to you for payment.”

On September 22, 1911, the supervisor also sent the following printed letter (which was in a printed form) to the commanding officer at the barracks :—

“ Dear Sir,

“ Re Nurses' Quarters, Hounslow Barracks.

“ My attention has been directed to the fact that building operations are being carried out at your premises.

“ A supply of water for such purposes can only be afforded under section 17 of the Metropolitan Water Board (Charges) Act, 1907, providing for payment at the rate of seven shillings (7/-) per cent. on the estimated cost of the work. An account will therefore be rendered to the builder on these terms, and I am acquainting you with the fact, as the Board will not be prepared to make any allowance from your meter readings should you allow the builder to utilise your existing supply.”

On December 20, 1907, the Water Board had passed the following resolution:—“ That pursuant to the authority in that behalf given to them by section 17 of the Metropolitan Water Board (Charges) Act, 1907, the Board do hereby determine that, in lieu of affording supplies for building purposes under the said section by measure, such supplies be afforded from the 1st April, 1908, until further order at the rate of 7s. per 100l. of the probable total cost of the building or part of a building for which the supply is required, after making such allowance as the Board by

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their appeal and assessment committee may think reasonable for decorative or iron or steel work not requiring the use of water." There was no evidence that any question of allowance for decorative or iron or steel work was ever considered in the case of this particular building.

The defendants having refused to comply with the request contained in the above letter of September 21 to fill in a form of application for a building supply, and to pay the 7s. per 100l. upon the estimated cost of the work, the present action was commenced. It was admitted at the trial that the water used in the building operations was taken from the War Office tap and that the War Office had paid for it by meter.

The county court judge held that the plaintiffs were entitled to recover the amount claimed under s. 17 of the Metropolitan Water Board (Charges) Act, 1907; that the plaintiffs could, by the general resolution of December 20, 1907, "determine" to make the charge within the meaning of the proviso to that section; and that there was nothing in the agreement of September 3, 1909, with the Secretary of State for War to interfere with their right to claim payment under s. 17. He accordingly gave judgment for the plaintiffs. Upon appeal to the Divisional Court (Channell and Avory JJ.) the learned judges differed in opinion, and the judgment of the county court judge stood. The following written judgments were delivered:—

1912. Nov. 29. CHANNELL J. In my opinion this appeal ought to be allowed, but as my brother Avory agrees with the county court judge, the appeal will be dismissed. I think it is the proper result, wherever there is an appeal to two judges who differ, that the judgment appealed from should stand, and not that the junior judge should withdraw his judgment.

The amount sued for is only 14s., but we are told that it is a question of importance, and, therefore, there should be leave to appeal, and in case there should be an appeal, it is desirable that I should state the grounds of my opinion, although they will not affect the result.

I think that the defendants are not persons who "require a supply of water" within the meaning of those words in s. 17 of

the Act in question, and unless they are, the action is clearly not maintainable. Those words, in my opinion, mean persons who desire to be supplied with water by the Board, in other words, persons who desire to become customers of the Board for their water. They are the words uniformly used throughout this and, so far as I know, all the water companies' Acts for that purpose. The supply of water by water companies is a matter of statutory contract. No persons are obliged to take the company's water by the company's Act. Sanitary Acts sometimes may put on such compulsion, but it is not done in Water Acts, the scheme of which is to provide a supply which those who desire it may take on the statutory terms. Of course the companies have exclusive rights in their districts, and may prevent occupiers taking from an intruding company, and also they have statutory rights and powers as to preventing misuse of their water, but they have no direct power to compel unwilling persons to become their customers. Other persons, however, have the right of demanding a supply if they do wish it, and one important function of the Water Acts is to define the persons who are to have that right. I think the 17th section in question merely gives to builders the right which the decision in the case of *Metropolitan Water Board v. Paine* (1), decided immediately before the passing of this Act, shewed that they had not then got, at any rate in the case where they were commencing to build on land where there had been no previous building. This section clearly would give the right in such a case, and also in other cases not perhaps directly governed by that decision.

In ss. 8 and 16 of this Act the similar words appear to me to bear the meaning which I put upon them here. I do not read "require" as equivalent to "request," and it is not inconsistent to say that the person requiring to be supplied by the Board, in the sense of desiring to become a customer, must intimate his desire by a request. It is agreed that, if the defendants got their supply from a well and for that reason did not require to be supplied by the Board, they could not be sued for charges under s. 17, and it makes no difference, in my opinion, that they are using water which once was the property of the Board, but which

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they are taking from persons who have paid the Board for it. It may be that it would be right in some cases to apply to persons who, without any colour of right, were taking the Board's water the doctrine of estoppel, and to say that, although they were not really persons requiring to be supplied by the Board with water, yet by reason of their wrongful acts they could not be heard to say that they were not, and consequently were liable to be sued under the 17th or corresponding sections. I do not, however, think that the defendants in such a case as this are estopped from shewing the true facts. They are not acting without any colour of right, and I am not satisfied that anything wrong is being done. If the War Office are breaking their agreement by using the water passing through their meter as they do, they may no doubt be proceeded against for breach of their agreement, and possibly are liable to penalties under s. 18 of the Waterworks Clauses Act, 1863. That section, however, appears to provide only for cases where the supply is either for domestic purposes only or for some specified purpose or purposes other than domestic, the words being "for any other than domestic purposes." Here the agreement provides, by clause 9, that the water shall be used only for the purposes specified in the schedule, and for no other purpose whatsoever, and the schedule might have been so filled up as to forbid the use now being made, but it does not appear to be so. The agreement (like s. 18 of the Act of 1863) appears to contemplate that particular purposes will be specified in the schedule, as, for instance, "domestic and for use in stables, or gardens, or watering barrack yard," or the like. It is merely "domestic and non-domestic," after which there is a blank not filled up, and so it is left quite general. I doubt, therefore, whether anything which is wrong is being done, but if it is the Board should take the appropriate proceedings. It seems to me that, as long as the Board are taking payment for the water used by the builders from the War Office, they cannot say that the builders, who do not in fact require to be supplied by the Board, are estopped from saying so, and can be treated as if they did require the supply. I do not think this case differs from that of a person supplied with water by meter, who underlets part of the premises for which he has the supply and

arranges that his under-tenant shall use the water coming through his meter. I do not think in such a case the water company could sue the under-tenant for water charges, although possibly, if the under-tenant was an occupier and not a mere lodger, they might insist on the supply being separate. I see no ground for saying that the statute, by giving an alternative mode of charging builders who do require their water, intended to give the Board a power to charge builders a higher rate than other persons. That it does work out higher in practice I do not doubt; and the anxiety of the Board to get it sufficiently proves that it does; but it is not apparent on the face of the statute that it would be so. The 7s. rate appears to be given to save the trouble of measuring the water in cases where the supply is almost certain to be temporary only. In the great majority of cases where builders come on premises or land in order to build there would probably either be a supply not by meter or no supply at all, and then the question which arises here could not arise. If the Board want to prevent these cases arising in the future, I think they should put into the schedule of their agreements for meter supply "non-domestic otherwise than for building operations," or some words equivalent to those. Then by proper proceedings they could eventually get the charge they are suing for, although I am not quite sure that even then they could at once sue the builder.

The other question, as to whether a general resolution beforehand will do, or whether each case must be considered, is perhaps not free from doubt, but on the whole I agree with my brother and the county court judge as to that.

AVORY J. I need hardly preface my judgment by saying that I differ from my brother Channell with the greatest hesitation.

This action was brought in the county court at Westminster to recover the sum of 14s. for water used by the defendants as builders in building operations at the Hounslow barracks. The Water Board claimed to recover this sum under s. 17 of the Metropolitan Water Board (Charges) Act, 1907, such sum being calculated at the rate of 7s. per cent. of the probable total cost of the building. The county court judge gave judgment for the

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plaintiffs, upholding their contention that they were, under the circumstances, entitled to make this special charge under s. 17 and to recover the same from the builders. No question has been raised as to the form of the action, and the only point argued before us was whether the defendants are liable, under the circumstances, to pay this special charge or any sum for the use of the water in their building operations.

The material facts are that on September 3, 1909, an agreement was entered into between the Water Board and the Secretary of State for War for the supply of water to the said barracks at Hounslow by meter at certain rates therein specified. By clause 9 of the agreement, "the water supplied shall be used only for the purposes specified in the schedule and for no other purpose whatsoever," and the purposes specified in the schedule are "domestic and non-domestic." In the year 1911, and during the currency of the said agreement, the defendants, as builders under a contract with the War Office, erected a new building or addition to the existing buildings at the said barracks, it being a term of the contract that the water necessary for use in the building operations should be supplied by the War Office free of charge to the defendants; and such water, in respect to which the claim in this action is made, was in fact taken and used by the defendants from the supply at the said barracks under the said agreement, and, being measured by the meter, would in the ordinary course be paid for by the War Office at the rate specified in the schedule. It was contended for the defendants that the supply under the agreement, being for domestic and non-domestic purposes, included a supply for building operations on the premises; that the water so used was in fact used by the War Office for such purpose and would be or had been paid for by them under the agreement; and that the builders (the defendants) had not in this case required any supply of water for the purpose of erecting any building within the meaning of s. 17 of the Act, and therefore it had no application to them.

It was suggested that s. 17 owes its origin to the decision of the Court in *Metropolitan Water Board v. Paine* (1), but, assuming this to be so, that case only decides that the word "premises"

(1) [1907] 1 K. B. 285.

in s. 79 of the East London Waterworks Act, 1853, does not include land upon which the owner or occupier proposes to conduct building operations, and therefore that the owner or occupier of such land was not entitled to demand a supply by meter at the prices fixed in the section; and effect has to be given to the new power conferred on the Board of making a special charge for water used by builders. The substantial difficulty in the case is the construction to be put on the word "require" in s. 17. The same word is used in ss. 8 and 16 in different senses. In s. 8 it is used as synonymous with "demand," and in s. 16 as synonymous with "have need of." It appears to me that s. 17 must be read as ancillary or supplementary to s. 16, that the word "require" should be construed in the same sense as in s. 16, and that the effect and meaning of s. 17 is that a builder who has need of a supply of the Board's water for the purpose of his building operations must make the request for such supply to the Board contemplated by s. 16 and pay the special charge, if the Board so determine, for it. I do not think the builder can be heard to say that he does not require the water because he has succeeded in obtaining it without making the proper request under s. 16. The same contention would apparently cover the case of a builder making use of a domestic supply on the premises for building operations.

If I am right in this view, no question need arise, as suggested, of the Board being paid twice over, as a separate pipe can be laid by the builder, not connected with the meter, and notice to this effect was given to the War Office in this case on September 22, 1911.

With regard to the contention that this water was used by the War Office for a non-domestic purpose, and therefore within the schedule to the agreement, as interpreted by s. 25 of the Act, I do not think that agreement authorizes the consumer to supply water to a builder for the purpose of building operations on the premises, and so enable him to evade his liability under s. 17, but only authorizes the use of the water by the consumer for his own purposes as a consumer. (See ss. 18 and 20 of the Waterworks Clauses Act, 1863, and clause 18 of this agreement.)

A subsidiary point was raised that there had been no

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determination by the Board, within the meaning of s. 17, of the special rate of 7s. per cent. in this case. It was admitted that on December 20, 1907, a resolution of the Board was passed dealing with this subject, and that in practice, in each particular case under s. 17, the allowance contemplated by the section and resolution was made, and that in this case the facts did not justify or call for any such allowance. In my opinion, this was a valid and sufficient determination within the section.

I think for these reasons the appeal should be dismissed.

The defendants by leave appealed.

1913. June 17, 18. *Danckwerts, K.C.*, and *Micklethwait*, for the defendants. The only question raised in the county court is whether the plaintiffs are entitled to charge the defendants under s. 17 of the Metropolitan Water Board (Charges) Act, 1907, the statutory sum of 7s. per 100l. of the probable total cost of the building. That depends upon whether the defendants "required" a supply of water from the plaintiffs. It is submitted that the defendants did not "require" a supply from the plaintiffs. In *Metropolitan Water Board v. Paine* (1) it was decided in 1906 that the occupier of land upon which he wished to build was not the occupier of "premises" within the meaning of s. 79 of the East London Waterworks Act, 1853, so as to be entitled to a supply of water by measure for his building operations. In order to remedy that state of things s. 17 of the Metropolitan Water Board (Charges) Act, 1907, provides that a builder being about to erect a building, who shall require a supply of water for that purpose, "shall be deemed to be the occupier of premises within the meaning of" s. 16. In construing the Act of 1907 the rule of construction laid down by Tindal C.J. in *Parker v. Great Western Ry. Co.* (2), and adopted by Lord Macnaghten in *Metropolitan Water Board v. New River Co.* (3), must be applied, namely, that "the language of these Acts of Parliament is to be treated as the

(1) [1907] 1 K. B. 285.

(3) (1904) 20 Times L. R. 687, at

(2) (1844) 7 Man. & G. 253, at p. 690.

p. 288; 7 Sc. N. R. 835, at p. 870.

language of the promoters of them. They ask the Legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public." In the Act of 1907 there is no provision under which the Water Board can compel any one to take a supply of water. On the other hand, s. 8 provides that the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service pipe shall be laid, or of any person who under the provisions of the Act shall be entitled to require a supply for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at a rate per cent. of the rateable value of the house or building. The word "require" in that section means "demand." By s. 16, sub-s. 1, the Board shall "at the request of any owner or occupier of any premises . . . who requires for use on such premises a supply of water by measure for purposes other than domestic" afford a supply by means of a meter or other apparatus. There again the word "requires" has the same meaning as in s. 8, and means "demands" and not "has need of." The same meaning is seen in the words "if required" in the first proviso to s. 16, sub-s. 2, and the word "require" in the last proviso to that sub-section. The object of s. 17 being to place a builder who is about to build on land in the same position for the purpose of requiring a supply by measure under s. 16 as if he were the owner or occupier of premises, it only applies to a builder who comes forward as a customer of the Water Board for water.

Sect. 20 provides that the Water Board shall not be bound to afford a supply of water otherwise than by measure to, among other places, barracks, and the word "required" in the proviso to that section means "demanded." Sect. 25 defines domestic purposes. The Secretary of State for War is the person who has "required" the supply of water by measure to Hounslow barracks and he has paid for all the water used. The defendants have never "required" a supply from the plaintiffs within the meaning of ss. 16 and 17. They did not demand a supply from the

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plaintiffs; they got their supply from the Secretary of State for War. So long as the water is used on the premises and the Secretary of State pays for it, the plaintiffs cannot charge for it again. The Secretary of State for War has done nothing wrong; he has only supplied water, which belongs to him after it has passed through the meter and for which he has paid, to a person who is erecting a building on the premises in respect of which the water is supplied. He could clearly supply water to a painter executing work on the premises, and a builder stands in no different position. Even, however, if the Secretary of State for War were wrong in supplying water to the defendants, that would not make the defendants liable to the plaintiffs for the statutory sum under s. 17 of the Act. There is no contract by the defendants with the plaintiffs to pay for the water and no statutory obligation. The Secretary of State for War may or may not be liable to a penalty for misuse of the water. If an occupier of a house improperly supplies water to a gardener to water the garden the former may be liable for misuse of the water, but the gardener is not liable for the price of the water. Even if the defendants could be said to have committed a wrong in using the water as they did, the plaintiffs are not suing for the value of the water as if it had been properly supplied, thus waiving the tort, but are suing under s. 17 for the statutory sum. The judgment of Channell J. upon the main point was therefore right. [*Colley's Patents, Ltd. v. Metropolitan Water Board* (1) was also referred to.]

Next, the general resolution of the Water Board of December 20, 1907, was not a sufficient "determination" within the proviso to s. 17. The Board must consider the circumstances of each particular case, and cannot pass a general resolution applicable to all cases: *Reg. v. Sylvester* (2); *Macbeth v. Ashley*. (3) The condition precedent to the right to recover the statutory sum of 7s. per 100l. was not fulfilled, and upon this ground also the plaintiffs are not entitled to recover.

Clavell Salter, K.C., and *J. Goodland*, for the plaintiffs. The words "require a supply of water" in s. 17 of the Metropolitan

(1) [1912] A. C. 24.

(M.C.) 93.

(2) (1862) 2 B. & S. 322; 31 L. J.

(3) (1874) L. R. 2 H. L. (Sc.) 352.

Water Board (Charges) Act, 1907, mean "need a supply of water" and not "demand a supply of water." The words "not . . . requiring the use of water" at the end of s. 17 clearly mean "not needing the use of water," and the same word ought, if possible, to receive the same meaning when it occurs twice in the same section. Again, in s. 16, sub-s. 1, which says that "the Board shall at the request of any owner or occupier of premises . . . who requires for use on such premises a supply of water by measure," the word "requires" must mean "needs," as it would be absurd to read the words as meaning "at the request of any owner or occupier who requests a supply." If the word "require" has that meaning in s. 16, sub-s. 1, it must have the same meaning in s. 17, because s. 17 is only intended to bring a builder within the provisions of s. 16 as if he were the occupier of premises. The defendants were persons who had need of water for their building operations, and therefore "required" a supply within the meaning of ss. 16 and 17, and must pay for it according to the statutory rate of 7s. per 100l. But even if the word 'require' in s. 17 means "request" or "demand," the plaintiffs are entitled to succeed. The defendants having taken the water for their building operations are liable to pay the statutory rate for it as if they had demanded the supply. They have availed themselves of the Water Board's supply of water, and cannot evade liability to pay for it by saying that they did not request the supply. Where water is supplied to an occupier of a building at his request, either under s. 8 for domestic purposes or under s. 16 for non-domestic purposes, and the occupier gives up occupation and a new occupier comes into occupation and continues to take the water without making any request for it, the latter must pay the statutory rate for it. So too a builder who takes a supply of water without having made any formal request for it must pay the statutory rate. If a request is necessary, it must be inferred from the fact of user. The liability to pay for the water arises under a contract which is to be implied from the fact that the water is taken: *Trowbridge Water Co. v. Wilts County Council*. (1) The property in the water when it was taken from the pipes by the defendants was in the plaintiffs and

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(1) [1909] 1 K. B. 824, at p. 836.

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not in the Secretary of State for War; The water did not vest in the Secretary of State as soon as it had passed through the meter; it did not vest in him until it was drawn off at the taps for barrack purposes. If the supply were not by measure, or if the supply were to a dwelling-house under s. 8 for domestic purposes at a charge varying with the rateable value of the house, it could not be said that the property in the water passed to the consumer until it was drawn off by him at the taps. The passing of the water through the meter was merely for the purpose of measuring the sum payable and had nothing to do with the passing of the property in the water. This would be so even if the supply was under s. 16 without any agreement. But the agreement here makes it quite clear. Clause 6, making the consumer liable to pay for all water after it has passed through the meter notwithstanding any loss by leakage, waste, or misuse, would be meaningless if the water were already the property of the Secretary of State for War. Moreover, the property in the water would only pass to the Secretary of State if it were drawn off at the taps for the purpose of the supply contemplated in the agreement. The intention of the agreement was that the water should be supplied and used only for the domestic and non-domestic purposes of the barracks. It was never contemplated that the water should be used as a building material. The Secretary of State for War having received a supply for the domestic and non-domestic purposes of the barracks is not entitled to supply a builder with water as a building material for use in building operations. The property in the water used for that wrongful purpose never passed to the Secretary of State for War, but whether it did or not, in so supplying the water to the defendants he committed a wrongful act, and the defendants, who wrongfully took the water, are liable to the plaintiffs. The plaintiffs can waive the tort and sue for the value of the water as if it had been rightfully taken. If the Secretary of State for War can use the water supplied to him for building purposes, it follows that every consumer who has a supply for non-domestic purposes either under s. 16 or by agreement can employ a builder to build upon the premises and can supply him with the water necessary for the building operations,

and thus there will be created a privileged class of builders who build upon land in respect of which there is a non-domestic supply and who are outside s. 17; and thus there will be a violation of the policy of the Act as stated in the preamble and the provisions of s. 16, sub-s. 3, as to uniformity of rates of charge to all consumers. The Secretary of State for War had no right to supply the defendants with water for their building operations, and the defendants therefore were in the position of persons who wrongfully took a supply of water. Further, the plaintiffs have acquired, by s. 3 of the Metropolitan Water Act, 1902 (2 Edw. 7, c. 41), all the rights of the metropolitan water companies, including the West Middlesex Waterworks Company, which formerly supplied water to the district in which the Hounslow barracks are situated, and by the combined effect of ss. 3 and 38 of the West Middlesex Waterworks Act, 1852 (15 & 16 Vict. c. clix.), and s. 59 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), the defendants are liable to the plaintiffs for the loss sustained, that is, the price of the water which the defendants would have had to pay if they had taken it lawfully. The plaintiffs are therefore entitled to payment on the basis of the fair value of the water supplied: *South West Suburban Water Co. v. St. Marylebone Union*. (1) With regard to the suggestion of Channell J. that the plaintiffs can alter their form of agreement by excluding building purposes from non-domestic purposes, in the great majority of cases the water is supplied for non-domestic purposes under s. 16 without any written agreement, and therefore in only a very small number of cases could this be done. [*Piercy v. Pope* (2), *Evans v. Gornall* (3), and s. 18 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), which it was contended was incorporated with the West Middlesex Waterworks Acts, were also referred to.]

[*Danckwerts, K.C.* The only point open to the plaintiffs is that taken in the county court,—*Smith v. Baker* (4)—namely, whether the plaintiffs were entitled to recover the 7s. per 100l. of the probable total cost of the building under s. 17 of the Act of 1907.]

(1) [1904] 2 K. B. 174, at p. 185.

(3) (1892) 8 Times L. R. 602.

(2) (1881) 30 W. R. 60; 45 L. T. 477.

(4) [1891] A. C. 325.

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With regard to the resolution of December 20, 1907, there are many of these builders' cases, and there must be a certain amount of delegation of the duty of "determining" what the rate charged shall be under s. 17 of the Act of 1907. The Water Board as a board cannot determine each of these cases. They have therefore passed the general resolution fixing the scale, and have left it to the appeal and assessment committee to hear any objection by the builder in any particular case against paying the full charge of 7s. per 100l. and any claim by him to a deduction for decorative or iron or steel work not requiring the use of water. Unless the builder objects the maximum sum applies. There was therefore a sufficient determination within the meaning of the proviso to s. 17.

Danckwerts, K.C., was not called upon to reply.

VAUGHAN WILLIAMS, L.J. In this case I propose to limit my judgment strictly to the questions which were raised in the county court, because if they were not raised there they cannot be raised on the appeal. I do not propose to discuss matters which, though they were argued before us, were not raised in the county court. Looking at the judgment of the county court judge, it seems to me that the questions raised in the county court are not numerous. I do not think it will be necessary for the purpose of dealing with this case to decide at what point of time or at what exact spot the property in the water passes from the Water Board and becomes vested in the consumer. I am extremely anxious not to decide any points unnecessarily which are not required for the decision of the case, because I do not wish, unless there is a real occasion for doing so, to lay down any rules or principles which will bind the Water Board on the one hand or consumers on the other.

I shall now deal with the true construction of s. 17 of the Metropolitan Water Board (Charges) Act, 1907, and in this connection I shall have to refer to s. 16. Sect. 17 provides that "any builder being about to erect any building or part of a building who shall require a supply of water for that purpose shall be deemed to be the occupier of premises within the meaning and for the purposes of the section of this Act relating to

'supply by measure'; Provided that if the Board so determine they may, instead of affording the required supply by measure, afford the same at a rate not exceeding seven shillings per hundred pounds of the probable total cost after making such allowance as the Board may think reasonable for decorative or iron or steel work not requiring the use of water." The first point which was raised in the county court upon that section was whether the plaintiffs could by a general resolution "determine" within the meaning of the proviso so as to make their determination of general application. The county court judge held that the plaintiffs could do so, and the learned judges in the Divisional Court agreed with him upon this point, though Channell J. expressed some doubt about it. In my opinion the decision upon that point is wrong. The contention of the Water Board is that they were entitled at once to pass a general resolution that they would always charge the maximum sum. I do not think that they had any right to do that. In my judgment they are bound on each occasion to examine the matters which require examination, and to form their own conclusion as to how much, if any, of the work is decorative or iron or steel work not requiring the use of water, and to make a proper deduction in respect thereof from the total cost. They have passed this general resolution, and they have never given the particular case any consideration whatsoever as to an allowance for the matters specified.

With regard to the other part of the case, when the judgments in the Divisional Court are looked at it is clear that the principal if not the only point, in addition to that relating to the resolution to which I have just referred, which the learned judges considered was raised in the county court was as to the meaning of the word "require" in s. 17 of the Act of 1907. Channell J. in his judgment says: "I think that the defendants are not persons who 'require a supply of water' within the meaning of those words in s. 17 of the Act in question, and, unless they are, the action is clearly not maintainable." I entirely agree with that. He goes on: "Those words, in my opinion, mean persons who desire to be supplied with water by the Board, in other words, persons who desire to become customers of the Board for their water. They are the words uniformly used throughout

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this and, so far as I know, all the water companies' Acts for that purpose. The supply of water by water companies is a matter of statutory contract. No persons are obliged to take the company's water by the company's Act." It seems to me that what the Water Board are doing in this case is to assert that they are entitled to compel persons who do not ask or wish for a contract with the Water Board for a supply of water to take a supply. The Water Board had entered into a contract with the Secretary of State for War to supply Hounslow barracks with water for domestic and non-domestic purposes. Under a contract between the Secretary of State and the defendants the latter were to erect an addition to the nurses' quarters at the barracks, and the former undertook to allow the defendants to take the water necessary for the building operations free of charge. In that state of matters the two letters of September 21 and 22, 1911, which shew what was the position taken up by the Water Board, were written on behalf of the Board. I entirely agree with the statement of Channell J. that no persons are obliged to take the company's water by the company's Act. It is an option, and in my opinion s. 17 merely gives to a builder who is about to erect a building power to make an application under s. 16 for a supply of water for the building operations as if he were the occupier of premises, and it imposes upon him no obligation to take water for the building operations. Channell J. then says that "Sanitary Acts sometimes may put on such compulsion, but it is not done in Water Acts, the scheme of which is to provide a supply which those who desire it may take on the statutory terms. Of course the companies have exclusive rights in their districts, and may prevent occupiers taking from an intruding company, and also they have statutory rights and powers as to preventing misuse of their water, but they have no direct power to compel unwilling persons to become their customers." I agree with every word of that. The learned judge, after saying that s. 17 merely gave to builders the right which the decision in *Metropolitan Water Board v. Paine* (1), decided immediately before the passing of the Act, shewed that they had not then got, deals with s. 17 and the meaning of the word "require." He says: "In ss. 8 and 16 of this Act

(1) [1907] 1 K. B. 285.

the similar words appear to me to bear the meaning which I put upon them here. I do not read 'require' as equivalent to 'request,' and it is not inconsistent to say that the person requiring to be supplied by the Board, in the sense of desiring to become a customer, must intimate his desire by a request. It is agreed that, if the defendants got their supply from a well and for that reason did not require to be supplied by the Board, they could not be sued for charges under s. 17, and it makes no difference, in my opinion, that they are using water which once was the property of the Board, but which they are taking from persons who have paid the Board for it." I desire to say that I can and ought to decide this appeal without expressly affirming, though not denying, the proposition in the last lines which I have just read. Though I have formed an opinion as to that, I do not wish to decide at what point the property in the water passes. I do not wish to decide anything which is not necessary for the decision of this case. The learned judge goes on to say that "it may be that it would be right in some cases to apply to persons who, without any colour of right, were taking the Board's water the doctrine of estoppel, and to say that, although they were not really persons requiring to be supplied by the Board with water, yet by reason of their wrongful acts they could not be heard to say that they were not, and consequently were liable to be sued under the 17th or corresponding sections. I do not, however, think that the defendants in such a case as this are estopped from shewing the true facts." I agree that, if the true facts are that the builders have never required in the sense of asking for a supply of water, no estoppel arises to prevent them from proving such to be the case. "They are not acting without any colour of right, and I am not satisfied that anything wrong is being done. If the War Office are breaking their agreement by using the water passing through their meter as they do, they may no doubt be proceeded against for breach of their agreement, and possibly are liable to penalties under s. 18 of the Waterworks Clauses Act, 1863." That again cannot affect the claim which the Water Board are making against the builders in this action. It may be that the War Office have done wrong; it may be that the War Office have incurred penalties;

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but that does not of itself give a right of action against the builders. The learned judge proceeds to point out with reference to s. 18 of the Act of 1863 that it "appears to provide only for cases where the supply is either for domestic purposes only or for some specified purpose or purposes other than domestic, the words being 'for any other than domestic purposes.' Here the agreement provides, by clause 9, that the water shall be used only for the purposes specified in the schedule and for no other purpose whatsoever, and the schedule might have been so filled up as to forbid the use now being made, but it does not appear to be so." I think that that is important. In what I am saying I do not suggest that a stipulation might not have been inserted in the agreement which would have limited the meaning of or the area covered by the words non-domestic purposes. That, however, has not been done. The purposes specified in the schedule to the agreement are "domestic and non-domestic." So far as the purposes of supply are concerned there is nothing, in my opinion, which would have prevented the Water Board, if they had thought fit, qualifying the word "non-domestic" as Channell J. suggested. A little lower down Channell J. says: "It seems to me that, as long as the Board are taking payment for the water used by the builders from the War Office, they cannot say that the builders, who do not in fact require to be supplied by the Board, are estopped from saying so, and can be treated as if they did require the supply. I do not think this case differs from that of a person supplied with water by meter, who underlets part of the premises for which he has the supply and arranges that his under-tenant shall use the water coming through his meter." It is plain that the judgment of Channell J. depends upon the construction of the word "require" in s. 17 of the Act of 1907, assisted by the meaning it bears in s. 16, and apart from his decision as to the resolution of December 20, 1907, I entirely agree with his judgment.

With regard to the judgment of Avory J., it follows from what I have said that I do not accept his view as to the meaning of the word "require" in s. 17. I prefer that of Channell J. I do not think that the word "require" means "have need of." I understand Avory J. to say further that, even if the meaning of the word "require" is decided against the Water Board, and

there has not in fact been any contract with them by the defendants to take the water, yet the defendants have in fact taken the water and used it for the purpose of building, and are therefore estopped from saying that they did not ask for it and contract to take it; and that the Water Board, instead of treating them as persons who had taken water which they were not entitled to take, might treat them as having contracted to take the water. In my opinion there is no ground for saying that any estoppel arises in this case. The action being to recover a debt for water supplied, in order to succeed the Water Board must make out a contract. Debt is the result of a contract and not of a tort. I do not propose to say a word as to the suggestion that, if the Water Board's contention were correct, they would be paid twice over for this water. I can decide the case without going into that question. Avory J. towards the end of his judgment said that he did not think that the agreement authorized the consumer to supply water to a builder for the purpose of building operations on the premises, thus enabling the builder to evade his liability under s. 17, but only authorized the use of the water by the consumer for his own purposes as a consumer. In my opinion no such question arises here. But it seems to me, though I do not decide it, that unless there is something in the agreement which forbids it being done—and there is no such prohibition in this agreement—to use the water for the purpose of building an addition to the existing barrack buildings is one of the purposes for which the consumer is entitled to use the water. As I have said, I purposely refrain from deciding any question beyond those which are necessary for the decision of the case, and therefore I have made no comment on the conduct either of the War Office or of the Water Board, as it is not necessary to do so. All I have to decide is whether in this particular case the conditions precedent entitling the Water Board to make this charge under s. 17 have been fulfilled. In my opinion they have not. The appeal must therefore be allowed and judgment entered for the defendants.

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BUCKLEY L.J. On April 3, 1912, the Metropolitan Water Board issued in the county court a summons which was served upon the

C. A. defendants and in which they claimed to have payment of a
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Metropolitan Water Board in respect of water used for building annexe to nursing sisters' quarters at the barracks, Hounslow, 14s." The action was tried before the judge and he gave judgment for the plaintiffs. Upon appeal to the Divisional Court the learned judges in that Court were divided in opinion, Channell J. thinking that the judgment of the county court judge was wrong, and Avory J. thinking that it was right. In those circumstances the judgment of the county court judge was treated as standing, and the matter is now brought before us on appeal.

In the argument before us a number of points have been discussed involving matters upon which I have formed opinions but do not propose to express them, for the reason that, in my view, they are not open for consideration in this Court, and therefore the opinion which I hold upon them is not material. It is to be borne in mind that there is no appeal from a county court upon a question of fact, and as regards any question of law the only point that can be raised on appeal is a point of law which has been raised before the county court judge. The raising of the point of law at the trial is a condition precedent to an appeal from the decision in the county court. The first thing, therefore, is to see what questions of law were raised before the county court judge, bearing in mind what were the conclusions of fact on which he proceeded. I do not myself feel any difficulty in determining what it was that was argued before him. We have his notes and his judgment, and from his notes I find that the following facts were admitted and therefore are to be taken as facts before us, first, that the water in question was taken from the War Office tap and that the War Office had paid for it by meter; and next that the work being done was the construction of an annexe to the nurses' quarters. In order to make that intelligible I ought to say that on September 3, 1909, a contract had been entered into between the Metropolitan Water Board and the Secretary of State for War, or some person representing him, under which the Water Board were to permit the Secretary of State to take a supply of water from the Board's mains for the premises and purposes specified in the schedule thereto. The

premises specified were cavalry and infantry barracks, Hounslow, and the purposes were domestic and non-domestic. That contract having been entered into, the Secretary of State for War was in 1911 proposing to build two additional rooms for the nurses' quarters at the barracks. He employed the defendants to build the rooms for him. For the purposes of their construction water was required, and according to the admission to which I have already referred the water which the defendants used was taken from the War Office tap and the War Office paid for it by meter. I next turn to the judgment of the county court judge. In substance it consists of three parts. The first part is a discussion as to the proper construction of s. 17 of the Metropolitan Water Board (Charges) Act, 1907; the second part, also on s. 17, deals with the meaning of the word "determine" in the proviso to that section; and the third part deals with the proper construction of the agreement of September 3, 1909. So far as to what he did decide. Now I wish to state what he did not decide and upon which, so far as I can see, no question was raised before him. We have heard a discussion as to whether certain sections of certain Acts of Parliament have been incorporated into the Acts which regulate the Metropolitan Water Board, those being sections which shew that under certain circumstances damages or penalties may be recovered from persons who are said to stand in the position in which the defendants stand. No questions of that kind were argued before the county court judge, and I may add that in this action we have nothing to do with either damages or penalties. The action is brought in debt. One possible view is that there was a tort which was waived, and the action was brought for the value of the property which had been tortiously taken but which was assumed to have been rightfully taken. That point, to my mind, is not open to the plaintiffs. In the first place the tort, if any, was not waived, and in the second place, if it was waived, the action is not brought for the value of the water taken, but is brought for a statutory sum upon the footing of a certain relation existing between the Water Board and the defendants as builders. The question is whether or not that relation existed. The only matters, therefore, which it appears to me are open for decision

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in this Court are, first, what is the proper construction of the Act of 1907, and second, what is the proper construction of the agreement of September 3, 1909. I might, if I thought proper, deal with both of these, but I propose to deal only with the first because it is sufficient to dispose of the case, though I have formed an opinion upon the second which would equally decide the case in favour of the defendants.

The former of these two questions is, what is the proper construction of the Act of 1907? The principal point to determine is what is the meaning in that Act of the word "require." In investigating that I turn first to s. 16. It is not the section upon which the decision necessarily depends, but I think it helps to a proper understanding of the word where it occurs in the section on which the decision does depend. Sect. 16 is this: It provides that the Board shall do something in a certain event. I will read first what the Board has to do. Reading only the relevant words, the Board shall afford a supply of water by meter or other fit and sufficient instrument or apparatus. There we have the obligation imposed upon the Board to afford a supply of water by meter. The event in which they are to do that is this: "At the request of any owner or occupier of any premises situate in or adjoining any street in which any main or service pipe of the Board is or shall be laid who requires for use on such premises a supply of water by measure for purposes other than domestic." Does that word "requires" mean "has occasion for," or does it mean "asks for," "demands," or "requests"? First, let me see whether it can mean "has occasion for." His occasion for water is not dependent upon his wanting it by measure; it is dependent upon the necessities of his case, and, therefore, if the word "requires" is read as meaning "has occasion for," the words "by measure" are not wanted, and from what I have first said it is evident that they are not wanted for the purpose of shewing that the Board shall give the supply by measure because that has already been done by the words "afford a supply of water by means of a meter." His occasion, his necessity, is not an occasion or necessity to have it by measure as distinguished from having it in some other way;

his occasion is to have it. Therefore the word "requires" cannot mean "has occasion for." If on the other hand the word is read as meaning "asks for," "demands," or "requests," the enactment is perfectly intelligible. If he wants to ask for, or to demand, or to request a supply of water he must ask for, demand, or request it by measure; he cannot ask for it in any other way. If he asks for it by measure and agrees to pay for it by measure, then the Board shall afford it to him by means of a meter. Therefore in s. 16 it seems to me to be clear that the word "requires" does not mean "has occasion for," but means "asks for," "demands," or "requests."

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I come now to s. 17, upon which the question arises. The purpose of s. 17 is this. It had been decided in November, 1906, in *Metropolitan Water Board v. Paine* (1) that the owner or occupier of land upon which he was desirous of building was not the owner or occupier of premises so as to be entitled to a supply of water for building purposes. Probably in consequence of that decision, though I do not know it as a fact, s. 17 was introduced into this Act to provide for that state of circumstances, and the way in which it is done is this. The section begins by providing that within the meaning and for the purposes of the section of the Act relating to "supply by measure" (s. 16) a builder who is not an occupier of premises shall be deemed to be an occupier, and being an occupier he can demand a supply under s. 16; so that now for the purposes of s. 16 a builder who is not an occupier is to be deemed to be an occupier, and the section speaks of him as a person "who shall require a supply of water" for the purpose of building. The word "require" there, to my mind, has the same meaning as in s. 16. The builder is brought into s. 16 as a person who is deemed to be there because he is deemed to be an occupier of premises, which he is not, and being within s. 16 he is considered as a person who "requires" a supply of water under that section, that is to say, who asks for or demands it. So far therefore I come to the conclusion that the word "require" has the meaning which Channell J. attributes to it, and not that which Avory J. attributes to it. In my opinion it means "demands," "asks for," or

(1) [1907] 1 K. B. 285.

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"requests." I now pass on to the proviso to s. 17, which is also material upon another point. In the case of a builder who is deemed to be, but who is not, an occupier of premises, the proviso says that the Board may deal with him in a particular way. They may, if they so determine, refuse to afford him the required supply by measure which under s. 16 he would otherwise be entitled to, and may instead afford him the supply at a rate not exceeding 7s. per 100l. of the probable total cost after making such allowance as the Board may think reasonable for decorative or iron or steel work not requiring the use of water. I do not think that anything turns on the words "not requiring" there; they mean "not calling for," "not necessitating," or "not wanting." This is a proviso which enables the Board in a particular excepted case, namely, that of a builder who is not an occupier, to refuse to supply him with water by measure and to charge him instead a sum which cannot exceed a certain maximum from which there must be a deduction if the Board think it reasonable that a deduction ought to be made. The Board must apply their mind to that question and determine what deduction, if any, is reasonable.

That being the true construction of the Act, what happened was this. The builders took the water they used from the taps of the War Office at the barracks, and the Metropolitan Water Board said that that was wrong. They are entitled to think and to contend that it was wrong, but they ought not to have written a letter which misstated the Act and which made demands which in my view they were not entitled to make. On September 22, 1911, the supervisor of the Water Board wrote to the commanding officer at the barracks a letter in which in substance he says that s. 17 provides for payment at the rate of 7s. per cent. on the estimated cost of the work. That is not a true statement of the effect of s. 17. It does not provide for payment at the rate of 7s. per cent. on the estimated cost of the work; it names a maximum sum of 7s. per cent. on the cost subject to such allowance as the Board may think reasonable. The Board had by a general resolution, which was passed before the Act came into operation and which therefore may be of no effect at all, determined that they would charge the maximum rate of

7s. per 100l., but the letter omits to state that the consumer may be entitled to a deduction from that maximum sum. It says nothing about that. The letter then states this: "An account will therefore be rendered to the builder on these terms." Those words plainly mean that the Board were going to charge the builder for the water, which they were entitled to do if their contention was right, but the letter also says, "and I am acquainting you with the fact, as the Board will not be prepared to make any allowance from your meter readings should you allow the builder to utilise your existing supply." That can only mean that the Board are going to make both the Secretary of State for War and the builders pay for the water, that is to say, that they are going to enforce payment for the water twice over. Therefore so far as I can see there can be no dispute that the Board were intending to enforce payment for the water twice over. That letter of September 22, 1911, was not a letter written for this occasion only; it is on a printed form, "B. No. 7," which I suppose is sent to everybody in like cases. I trust that the Water Board will cease to use that circular.

In these circumstances the Water Board bring this action against the builders. They contend that the builders are liable to them by virtue of s. 17. They say that the builders have required a supply of water, reading the word "required" as meaning that they wanted the water, and having received the water that they are persons who by virtue of the Act have taken water from the Board, and consequently have to pay for it at a certain rate as the section provides. Upon my construction of the word "require" there is no foundation for that argument. The defendants are persons who have not entered into any contractual or other relation of any kind with the Water Board. If the Board are right in their contention that the builders have taken the water wrongfully as against them, the builders may have been guilty of a tort; but neither by contract inter partes, nor by imposition by statute of a liability upon a person doing a particular act, have the builders ever become liable in debt to the Water Board.

There is a further matter arising upon the proviso to s. 17. Upon the assumption that s. 17 applied the Water Board would

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be entitled to charge 7s. per 100l. upon the probable total cost of the building—which I suppose was taken to be 200l. as 14s. is claimed—after making such allowance as they might think reasonable for decorative or iron or steel work not requiring the use of water. The Board might well think it reasonable not to deduct anything, if the case allowed it, or they might think that some sum ought to be deducted. Until they have determined that, there is no ascertained sum for which the builders who have taken the water are liable in debt at all. The result is that the plaintiffs are claiming in this action a sum in respect of which no liability is shewn.

Upon these grounds it seems to me that upon the construction of the Act and without considering the question of the true construction of the agreement of September 3, 1909, the plaintiffs have failed to make out the existence, as between them and the defendants, of any such relation either by contract or by statute as enables them to sue the defendants for the debt or claim for 14s. specified in the summons in this action. I do not propose to consider the question of the true construction of the agreement of September 3, 1909, as to whether the water which the defendants took belonged to the plaintiffs or whether it belonged to the Secretary of State for War. It is an important question, and I have formed an opinion upon it, but I prefer to express no opinion at all. It seems to me that I may rest my judgment wholly upon the construction of the Act. Nor do I say anything as to the other points which were raised before us but which were not raised in the county court. In my opinion for the reasons I have given the appeal ought to succeed and judgment ought to be entered for the defendants.

HAMILTON L.J. I agree that the appeal must be allowed. The effect of s. 17 of the Metropolitan Water Board (Charges) Act, 1907, is to bring into s. 16 a builder, "who shall require a supply of water" for the purpose of erecting a building or part of a building, as though he were the occupier of premises; and in my opinion the word "require" in s. 17 must be interpreted as the word "requires" is interpreted in s. 16, sub-s. 1. The argument derived from the use of the word "requiring" at the end of the

proviso to s. 17 seems to me to have no force. The word is there used in respect of an inanimate object, namely, decorative or iron or steel work, whereas the word "require" in the first part of the section is used in respect of an animate person, and presumably, therefore, has some reference to his mentality. I do not think that the word "require" can be construed as meaning "need." I cannot interpret this special Act, which was promoted by the Metropolitan Water Board, as conferring on the Board the right to impose a supply of water upon a person simply because he needs water. I am prepared to accept the argument that the words at the beginning of s. 16, "at the request of any owner or occupier," do not make an actual request a condition precedent to the application of the section, so as to enable a consumer to evade the responsibilities of the section by the simple process of taking the water without asking for it; but it seems to me that ss. 16 and 17, when they refer to a person who requires a supply of water by measure, mean a person who desires to have a supply. If there is such a person, then the Board is required to afford him a supply by means of a meter or other apparatus, and subject to the application of the proviso in s. 17 the Board shall thereupon be entitled to charge for the supply at certain rates per thousand gallons. Before the Board can be entitled to sue the defendants, as they have in this action, for a statutory sum in consideration of a supply of water afforded to them, they must establish the fact that such a supply was afforded by them to the defendants, otherwise they have to fall back upon the argument, which as I have said is untenable, that, although they have not done so, the defendants' need of water is the measure of their obligation and confers upon the Board the right to claim the statutory sum. The facts here shew that no supply of water was ever afforded by the plaintiffs to the defendants. The plaintiffs' complaint is that the defendants were not willing to take such a supply; the defendants said that they were neither willing nor bound to take it. The plaintiffs complained to the War Office that the supply was being furnished to the defendants, not by the Board, but by the War Office. It is admitted that the supply was so furnished, and therefore the defendants were never brought within ss. 16 or 17 at all.

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There remains the other point as to the resolution of the Board. The Court below held that the Board had properly brought into operation the proviso to s. 17, and had thereby enabled themselves, supposing that they had afforded a supply for which they were entitled to charge, to claim a sum, not based upon the value of the water according to the rate under which the supply by meter was charged, but based upon a rate per cent. of the probable total cost of the building in course of erection after making such allowance as the Board might think reasonable for certain work not requiring the use of water. It seems to me to be clear that the Board did not bring that proviso into operation. To what extent the Board are obliged to give their own consideration to each case, to what extent they may be entitled to dispose of a batch of cases at one time, or to adopt the report of their subordinates or their committees with regard to those cases, are questions as to which I say nothing. I think it is clear that the words "they may, instead of affording the required supply by measure, afford the same at a rate not exceeding seven shillings per hundred pounds of the probable total cost," shew that the determination, in order to be a determination within the meaning of the proviso, must have reference to the supply actually required, and cannot be satisfied by a resolution passed before this or any supply was required at all. The resolution was in truth only a declaration of the opinion or the policy which commended itself to the Board. Further, in my opinion the plaintiffs could only claim 7s. per 100l. if they had satisfied the whole of the proviso, and the sum on which this rate is to be calculated must be ascertained after making such allowance as the Board may think reasonable for certain matters. There is no evidence that that matter has ever been considered at all. It is said that it is for the builder to advance a claim for such allowance, and that if he does not do so he cannot complain. I do not agree. In ascertaining the probable total cost, which must be ascertained before the claim in this action can be made, it was for the Board to satisfy all the conditions of the proviso with regard to it, and they had therefore to consider, not merely the rate per cent. and the probable total cost of the building, but

also whether any sum, and if so what, was in their opinion a reasonable deduction from the probable total cost to be made before applying the rate to the aggregate and calculating the sum to be paid. I do not think that it is necessary to express any opinion upon any of the other matters which have been discussed.

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Appeal allowed.

Solicitor for plaintiffs : *Walter Moon.*

Solicitor for defendants : *Solicitor to the Treasury.*

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[IN THE COURT OF APPEAL.]

WILMERSON v. LYNN AND HAMBURG STEAMSHIP
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*Employer and Workman—Compensation—Port and Harbour Authority—
Licensed Meters and Weighers—Compulsory Employment by Shipowner—
“Workman”—“Contract of Service”—Workmen’s Compensation Act,
1906 (6 Edw. 7, c. 58), s. 1—Finding of Fact by County Court Judge—
Review—Function of Court of Appeal.*

A workman was injured while weighing cargo on the defendants' steamship and claimed compensation under the Workmen's Compensation Act, 1906. He was an assistant meter and weigher appointed and licensed by the King's Lynn Conservancy Board under statutory authority and subject to certain internal rules and regulations of the Board providing (inter alia) that the employment of the meters and weighers should be in rotation according to a secret rota; that payment for their services according to a prescribed scale should be made by the shipowner to the headman appointed by the Board and be distributed by him, subject to certain deductions, amongst the meters and weighers, who were forbidden to receive any direct payment from the shipowner; and that the meters and weighers should act on all occasions under the direction and control of the Port and Harbour Committee of the Board, the committee having power to suspend and the Board having power to dismiss any meter and weigher for offences or irregularity. The employment of meters and weighers was compulsory in the case of shipowners desiring cargo to be weighed or measured within the limits of the port.

It appeared that while at work the applicant was subject to the control and direction of the ship's foreman, who, if dissatisfied with the

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meters and weighers supplied, could stop the work and send to the headman for others. The county court judge found that the applicant was in the employ of the defendants and awarded compensation :—

Held, that there was sufficient evidence to support the finding and that the award must stand.

The function of the Court of Appeal in dealing with findings of fact by the county court judge acting as arbitrator under the Workmen's Compensation Act, 1906, discussed.

APPEAL from an award of the judge of the King's Lynn County Court under the Workmen's Compensation Act, 1906, awarding compensation to the plaintiff, who was an assistant meter and weigher licensed by the King's Lynn Conservancy Board, for an injury caused by a 56 lb. weight falling on his foot while at work in the hold of the appellants' steamer, the *Tangermuende*, in the King's Lynn docks.

The King's Lynn Conservancy Act, 1897, incorporated the provisions of ss. 81 and 82 of the Harbours, Docks, and Piers Clauses Act, 1847, and by s. 53 empowered the King's Lynn Conservancy Board to appoint meters and weighers within the limits of the harbour and port.

In 1902 the Board made rules and regulations with respect to their sworn meters and weighers, which provided for the appointment of sixteen established meters and weighers and a headman and eight assistant meters and weighers, all of whom were sworn and licensed. The rules also provided (*inter alia*) that the headman and all the meters and weighers should conduct their business at the meters' office; that each meter and weigher should be employed in rotation according to a rota which was kept secret; that the charges for weighing should be as specified in the appendix and, subject to certain deductions, should be equally divided amongst the established meters and weighers; that the meters and weighers should act in every respect and on all occasions under the direction and control of the Port and Harbour Committee of the Board, the committee having power to suspend from benefit of the establishment during their pleasure any meter or weigher guilty of any offence or irregularity, and to report him, if they saw fit, to the Board for dismissal; that no meter and weigher should directly or indirectly receive any allowance, fee, gratuity, or reward from any person or on behalf of

any person interested in any corn, seed, or other goods weighed by him, the regular fees for same to be drawn by the headman or his nominee; and that the headman was responsible for the conduct and efficient discharge of each meter's respective duties, and the meters were ordered to recognize his authority as headman and to make their complaints in writing to him for the committee to consider.

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On February 15, 1912, the Board licensed and appointed the respondent Wilmerson as an assistant meter and weigher during the pleasure of the Board and subject to the rules and regulations.

On November 9, 1912, Baxter, the headman, received from the appellants one of their usual applications for six meters to assist at the unloading of the *Tangermuende* at Lynn Docks on November 11, and Wilmerson, being one of the six first on the rota for work, went to the meters' office, obtained the name of the vessel, arranged as to his name on the rota, left the office, and went to the ship. Hitch, the foreman of the appellants, fixed the hours of work and gave Wilmerson detailed instructions as to what he was to do and as to where goods were to be sent. On the 11th he was told to check sugar loaded out of the hold into trucks. On the 12th Hitch gave him instructions, with the assistance of two men who were admittedly servants of the appellants, to weigh cotton cake in the hold. He was engaged upon this work when the accident happened.

From the evidence at the hearing it appeared that the assistant meters always received what they earned, and that the fixed rates had been paid by the appellants to the headman, who divided them among the meters; that the headman had no control as to the place or hours of work; and that the ship's foreman if not satisfied with the meters could stop the work and send for the headman to supply other meters, and that so far as actual work was concerned the appellants had absolute control.

The county court judge came to the conclusion that the work was the work of the appellants and of their choosing, that they paid the wages, and that they had the power of selecting and controlling the workman and of dismissing him from the ship, and, if dissatisfied with him, of stopping the work until another

C. A. meter came; and he found that the appellants were in fact his
1913 employers and were liable to pay compensation.

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The steamship company appealed.

A. Neilson and Claughton Scott, for the appellants. The respondent is a sworn assistant meter and weigher appointed by and in the employment of the King's Lynn Conservancy Board. By the provisions of s. 82 of the Harbours, Docks, and Piers Clauses Act, 1847, the appellants were in the circumstances compelled to call in a licensed meter and weigher, and they had no power of selection, but had to take the respondent according to his place on the rota. He did not thereby become the servant of the appellants, who did not even pay him, but had to pay the fees to the Board or their officer according to the rules and regulations. The whole scheme of the rules indicates that their object is the benefit of the Board. *Gorman v. Gibson & Co.* (1), which was referred to and relied upon by the county court judge, is distinguishable from this case, for there was a condition in that case that the trimmers were paid by the shipowner, but here they are paid by the Board.

The appellants had no choice but were obliged to take this man, and they could only give him directions and not orders. There was no evidence at all before the county court judge on which he was entitled to find that there was a contract of service between the appellants and the respondent: *Curtis v. Plumtre*. (2)

Hollis Walker, K.C., and *B. O. Bircham*, for the respondent. This is a mere question of fact, and so long as there was any evidence to justify the county court judge in his finding, the Court cannot review it.

[COZENS-HARDY M.R. This Court reversed the finding in *Doggett v. Waterloo Taxi-cab Co., Ltd.* (3) on the ground that there was no evidence worthy of the consideration of the jury.]

There was ample evidence of employment by the appellants in this case. They had control over him during his work and he had to obey the orders of the ship's foreman and use the ship's

(1) 1910 S. C. 317.

(2) (1913) 6 B. C. C. 87.

(3) [1910] 2 K. B. 336.

weighing machines. They also could dismiss him, for although the Board alone could dismiss him from his office of meter and weigher, the shipowner could dismiss him from the actual work. Again, with regard to payment, the question is not out of whose hand do the wages come, but out of whose pockets are they paid. The appellants found the money and paid it to the headman, who paid it to the respondent. So that the three important features—control, dismissal, and payment—all point to a contract of service. By electing to have these goods weighed at the docks where the employment of these specially licensed meters and weighers was compulsory, the appellants in a sense selected him, and the case comes within the principle of *Gorman v. Gibson & Co.* (1) These were considerations proper to be left to a jury, and on them the county court judge arrived at certain findings which the Court cannot review.

[KENNEDY L.J. referred to *Smith v. General Motor Cab Co., Ltd.* (2)]

There was no contract of service between the respondent and the Board; he cannot earn anything on his licence alone without entering into a contract of service with an employer: *Simmons v. Heath Laundry Co.* (3)

Neilson in reply.

Cur. adv. vult.

July 5. COZENS-HARDY M.R. In this case the applicant met with an accident on board the appellants' ship while unloading in Lynn Harbour. Compensation was claimed, and the defence was that the relation of employer and workman did not exist between the parties. The learned county court judge has overruled this defence and has awarded compensation.

It is perhaps desirable to lay down, though not for the first time, the function of this Court in matters of this kind. It is for the county court judge, acting as arbitrator under the Act, to find the facts, and upon the facts so found to decide whether the relation of employer and workman exists. It is not correct to say that his decision is binding in all cases and cannot be reviewed. If he misdirects himself in point of law, this Court

(1) 1910 S. C. 317.

(2) [1911] A. C. 188

(3) [1910] 1 K. B. 543.

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can interfere. If there is no evidence worthy of the consideration of a jury in support of the decision, this Court can and ought to set it aside. The taxicab case, *Doggett v. Waterloo Taxicab Co.* (1), is a clear authority for this view. The county court judge there held that the driver was a workman and the taxicab owner was an employer, and awarded compensation. This Court held that there was no evidence to support that award. We held that the relation was that of bailor and bailee, not that of employer and workman, and we allowed the appeal. That case has since been approved in the House of Lords in *Smith v. General Motor Cab Co., Ltd.* (2)

If, however, there is evidence both ways, it is not competent to this Court to set aside the award of the county court judge, even though upon the balance of the evidence this Court might be inclined to take a different view. This principle has been repeatedly laid down. I need only refer to *Simmons v. Heath Laundry Co.* (3) Indeed it seems obvious from the language of the statute. When I say "if there is evidence both ways" it will be understood that I mean something more than a scintilla of evidence, something fit for the consideration of a jury. It remains to apply these principles to the facts of the present case, which certainly are peculiar.

The applicant is an assistant meter and weigher appointed by the Conservancy Board of King's Lynn under statutory authority. There are sixteen established meters and weighers and a headman and eight assistant meters and weighers, all of whom are sworn and licensed. The employment of one of the licensed men is compulsory. There is a rota which is kept secret; and each meter and weigher is employed in rotation. A vessel desiring meters and weighers communicates with the office, and the number of men required are sent to the vessel. Charges for the services thus rendered are fixed by a schedule, generally at so much per ton. The amount received by the headman, who is alone entitled to receive the money, is equally divided among the men, subject to certain deductions. No man is allowed to receive a penny directly or indirectly from the vessel.

(1) [1910] 2 K. B. 336.

(2) [1911] A. C. 188.

(3) [1910] 1 K. B. 543.

In these circumstances, I think it is impossible to say that there was no evidence to support the award. The shipowners wanted a meter and weigher, who must be a licensed man. It is true they did not select the particular individual. That was done for them. There is no difficulty in holding that they employed a man selected for them. They found the money which alone provided his wages or remuneration, and it is not material that all the licensed men pooled their earnings. They gave directions when and where and how the work should be done. They could send the man away from the vessel, although they could not deprive him of the status of a licensed meter and weigher. If they were not his employers I feel difficulty in saying who were, and I see no ground for holding that there was an "independent contractor."

I have purposely indicated only the points favouring the particular view adopted by the county court judge. But those points seem to me to be of such a nature as to render it impossible for us to interfere with his award.

The appeal must be dismissed with costs.

KENNEDY L.J. The only question raised by the appeal in this case is whether there was or was not evidence upon which the learned county court judge was justified in finding, as he has done, that the injury by accident which Wilmerson suffered whilst engaged at Lynn in weighing a cargo which was being discharged from the steamship *Tangermuende*, belonging to the appellants, the Lynn and Hamburg Steamship Company, Limited, was an injury arising out of and in the course of his employment by that company, or, to put it more shortly, whether the company was or was not at the time his employer within the meaning of the Workmen's Compensation Act.

Unless the appellants can shew either that the learned county court judge misdirected himself on a point of law, or that there was no evidence in support of his finding which, if the case had been tried with a jury, it would have been proper to submit to the consideration of the jury, this Court cannot interfere with the award. It is not suggested in the present case that the learned county court judge in any way misdirected himself, and

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I am of opinion not merely that there was evidence upon which the judge could come to the conclusion at which he arrived, but that that conclusion was the conclusion to which I should myself have come.

In the port of King's Lynn, according to the rules and regulations of the Conservancy Board, there has been created, in order to provide shipowners who send loaded ships to the port with skilled and responsible weighers and measurers of the cargoes to be discharged from those ships, a body consisting of sixteen established meters and weighers, a headman, and eight assistant meters and weighers, all of whom are, after proof of fitness, appointed by the Conservancy Board and hold office under the general supervision of the Port and Harbour Committee of that Board. The printed rules and regulations in relation to their duties and their remuneration were put in evidence. It is, I think, sufficient for the purpose of my judgment to say, in regard to the system established by these rules and regulations, that these meters and weighers are the persons who, if a vessel discharging in the port requires such services as they can render, must be employed; that they take their turns of work according to a rota; and that they are paid by the shipowner or merchant employing them, the payment being made according to a prescribed scale at the meters and weighers' office through the headman, who, after receiving the money from the shipowner or the merchant or his agent, distributes it as prescribed in the rules and regulations amongst the men. The Conservancy Board neither pays any of the meters or weighers, nor derives any pecuniary advantage from their employment. The result of these arrangements is that those who, like the owners of the *Tangermuende* in the present case, want their cargoes weighed or measured on discharge within the port of King's Lynn have to employ and to pay according to a prescribed scale some of these established meters and weighers or assistant meters and weighers who have been appointed, as I have said, by the Conservancy Board, after their fitness for the office has been carefully ascertained, and who are liable to the deprivation of their qualification by the Conservancy Board in case of misconduct.

It is, however, quite clear to my mind, from the evidence as to

what took place in regard to Wilmerson in the present case, that whilst those who, like the appellants, have need of meters and weighers are thus limited in the choice of such workmen, the relation of workman and employer within the meaning of the Workmen's Compensation Act is created between the meters and weighers and those who avail themselves of their services. Control—the right to direct and to interfere with the workman in regard to the method and manner of working—is generally the prominent note of such a relation. In the present case the meter and weigher works under the control of the shipowner's representative. "As far as actual work is concerned," said the appellants' manager, Mr. Tassell, "we have absolute control," and "If we are not satisfied with the meters, we should stop the work and send for the head meter to get others." The ship's foreman gives the orders as to where and upon what plan the work is to be done, and when the meter is to stop and when he is to go on.

It was in carrying out the work of weighing some cake as ordered that Wilmerson, owing to a 56 lb. weight falling on his left foot, met with the injury which caused his claim for compensation upon the appellants.

It appears to me, as I have said already, that there was not only ample evidence upon which the learned county court judge could come to a decision in favour of the applicant, but that it was in fact the right decision.

SWINFEN EADY L.J. In this case the county court judge has found that the steamship company were in fact the employers of Wilmerson, who met with an accident while employed in the hold of the steamship *Tangermuende* in weighing cotton cake. The weighing machine was in the hold, and a 56 lb. weight fell on his foot. The steamship company appeal on the ground that there was no evidence upon which the county court judge could hold that they were the employers of the applicant, and on the ground that the judge misdirected himself in law. Unless the judge misdirected himself in point of law the award cannot be disturbed, if there was evidence upon which the judge could arrive at the conclusion at which he did in fact arrive.

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C. A. The applicant was an assistant meter appointed and licensed
 1913 by the King's Lynn Conservancy Board. By s. 53 of the King's
 WILMERSON Lynn Conservancy Act, 1897, the Board have the appointment of
 r. meters and weighers within the limits of the harbour and port.
 LYNN AND The effect of this provision is to incorporate ss. 81 and 82 of the
 HAMBURG Harbours, Docks, and Piers Clauses Act, 1847. Under s. 81, the
 STEAMSHIP Board have the power to appoint and license a sufficient number
 COMPANY, of persons to be meters and weighers within the limits of the
 LIMITED. harbour, and remove any such persons at their pleasure, and
 may make regulations for their government, and fix the
 remuneration for weighing and measuring. It is under this
 provision that the regulations which have already been referred
 to have been made.

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Sect. 82 provides that when a sufficient number of meters and weighers have been appointed, the master of the vessel or the owner of the goods to be shipped or unshipped or delivered within the limits of the harbour shall not employ any person to weigh or measure other than a licensed weigher or meter, and if any unlicensed person shall weigh or measure the goods, such person, as well as the person by whom he shall be employed, shall be liable to a penalty of 5*l.*, and the weighing or measurement shall be deemed illegal.

This statutory provision, under which the meters and weighers are appointed and licensed, contemplates that although the selection, licensing, and governing of the meters and weighers are to be done by the Conservancy Board, these selected persons are to be employed by the master of the vessel or the owner of the goods as the case may be. It is not in the least inconsistent with the master employing these men that they are licensed and selected by the Board, and present themselves at the ship for work according to a rota kept by themselves and as directed by the head meter; nor does it matter that the remuneration is paid to the Board, who in turn distribute it among the men who have earned it. It is only paid to the Board as the authority regulating and governing the meters and weighers, and not as having entered into any contractual relation with the master. The master only had the power of selecting the men in this sense—that if he was not satisfied with any man sent he could

complain to the head meter and another man would be sent in place of the man objected to; otherwise the men worked strictly according to a rota which was to be kept secret.

In my opinion there was ample evidence to justify the county court judge in coming to the conclusion that the steamship company were the employers, and the applicant a workman within the meaning of the Act, and the learned judge did not misdirect himself in point of law. The only comment which I desire to make upon his very careful judgment is that he has not made quite clear the restricted sense in which he must have used the expression that the steamship company had the power of selecting the workman.

In my judgment this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Church, Rendell, Bird & Co., for J. A. Parsons & Carr, King's Lynn.*

Solicitors for respondent: *Field, Roscoe & Co., for Sadler & Woodward, King's Lynn.*

R. M.

C. A.

1913

WILMERSON

v.

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